Supreme Court
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,
Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?

2. Whether strict liability is the proper standard of liability under Title VII for *quid pro quo* sexual harassment?

LIST OF PARTIES

The proceeding in the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed, consisted of two proceedings, Nos. 95-3128 and 96-1361, which were consolidated by the Court of Appeals for purposes of decision.

The following persons and entities are now before the Court and were parties to the proceedings indicated:

Petitioner: Burlington Industries, Inc.* (No. 96-1361)

Respondent: Kimberly B. Ellerth (No. 96-1361)

The following persons and entities were parties to the proceedings indicated:

Alice Jansen (No. 95-3128); Packaging Corporation of America (No. 95-3128)

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* Pursuant to Supreme Court Rule 29.1, Petitioner Burlington Industries, Inc. states that it has no parent or subsidiary corporations, other than wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Burlington Industries, Inc. respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-208a) is reported at 1997WL 459001. The panel opinion of the court of appeals (App., *infra*, 209a-241a) is reported at 102 F.3d 848. The opinion of the district court (App., *infra*, 241a-287a) is reported at 912 F. Supp. 1101.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on November 27, 1996. An order was entered on January 28, 1997 granting a petition for rehearing with suggestion for rehearing en banc and vacating the panel decision. The decision of the United States Court of Appeals for the Seventh Circuit on rehearing en banc was entered on August 12, 1997. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)(1)

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Respondent, Kimberly Ellerth ("Ellerth") brought claims against Petitioner, Burlington Industries, Inc. ("Burlington") in federal court for employment discrimination and constructive discharge. The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et seq. and under 28 U.S.C. §1331 (federal question jurisdiction). The jurisdiction of the district court with respect to Ellerth's constructive discharge claim was invoked under 28 U.S.C. §1367(a) (pendent jurisdiction).

In a per curiam decision containing eight separate opinions, the Seventh Circuit, en banc, reversed the United States District Court and held that employers may be held strictly liable under Title VII of the Civil Rights Act of 1964 on a *quid pro quo* sexual harassment theory even if the allegedly harassed employee neither submitted to a supervisor's sexual advances nor suffered any adverse employment consequences as a result of refusing these advances.

The Seventh Circuit's decision in the instant case is directly contrary to the case law of the District of Columbia Circuit and is inconsistent with the holdings of the First, Second, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits. However, the Seventh Circuit's ruling is supported by recent rulings of the Third and Ninth Circuits. The factual and procedural history of this case is as follows:

Burlington hired Ellerth as a merchandising assistant in March, 1993. Three weeks after resigning from Burlington in May, 1994, Ellerth, who had been based in

Chicago, complained for the first time that she had been sexually harassed by Theodore Slowik ("Slowik"), a New York-based vice-president of one of Burlington's divisions, during the course of her employment. Ellerth alleged, inter alia, that Slowik asked inappropriate questions in her preemployment interview, stared at her, told offensive jokes, complimented her physical features, touched her inappropriately and made sexual innuendos to her over the telephone.[1]

According to Ellerth, Slowik also made comments which she claims insinuated that her reaction to his "harassment" would affect her career at Burlington. In the summer of 1993, Ellerth accompanied Slowik to a hotel lounge while on a business trip in North Carolina. She claims that Slowik stated, "You know, Kim, I could make your life very hard or very easy at Burlington."[2] At a promotion interview in March, 1994, Slowik allegedly acknowledged to Ellerth that he had told others that she was "arrogant" and "not loose enough" and that this gave him reservations about promoting her. Within a short period of time she was, in fact, promoted. Ellerth further alleged that she once telephoned Slowik for permission to perform a single, minor project and Slowik responded, "I don't have time for you right now, Kim, unless you're telling me--unless you want to tell me what you are wearing. Finally, in May, 1994, shortly before her resignation, Slowik allegedly asked Ellerth during a telephone conversation,

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[1] While Burlington contests many of these facts, for purposes of the summary judgment and appeal they have been considered as true.

[2] Burlington has contended below that Ellerth is time-barred from basing her claims on this statement.

"Are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."

Ellerth did not submit or otherwise respond to what she perceived as Slowik's sexual advances. Nor is there any evidence that Ellerth suffered any adverse employment consequences as a result of refusing Slowik's alleged advances. On the contrary, Ellerth received a promotion in March, 1994, approximately one year after commencing her employment at Burlington. Slowik interviewed Ellerth for this position and recommended that she be promoted.

Approximately two months after her promotion, Ellerth's direct supervisors began receiving complaints about Ellerth's work. When they (not Slowik) discussed these complaints with Ellerth, she voluntarily resigned.[3]

Ellerth never informed any of her supervisors or any of Burlington's human resources personnel about Slowik's alleged harassment until after her resignation. Ellerth was aware of Burlington's policy regarding sexual harassment. She had received and read Burlington's employee handbook containing this policy. Yet, she chose not to inform her supervisors because she purportedly believed that reporting Slowik's harassment would put her job in jeopardy. This purported belief, however, was not based upon any prior conduct of anyone at Burlington, nor any experience she had had at Burlington. Ellerth simply quit. Ellerth does claim that she informed certain co-workers about Slowik's alleged

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[3] Ellerth initially claimed that Burlington had constructively discharged her because Slowik's alleged harassment forced her to resign. As further discussed *infra*, the district court granted summary judgment for Burlington on Ellerth's constructive discharge claim. The Seventh Circuit did not disturb this holding on appeal.

harassment. Each of these persons denies that Ellerth mentioned any such thing to him or her.

Burlington moved for summary judgment on the grounds that, under the undisputed facts of the case, a reasonable jury could not find it liable for sexual harassment. The district court agreed and entered summary judgment in Burlington's favor. The district court did not believe that Ellerth had intended to advance a *quid pro quo* claim, but held that, in any event, "for Ellerth to prevail on a theory of *quid pro quo* harassment, she would have to prove that Slowik actually withheld tangible employment benefits as a result of her failure to submit to his sexual overtures." (App., *infra*, 264a) Because Ellerth had presented no such evidence, the district court disregarded *quid pro quo* as a basis for recovery. The district court also granted summary judgment for Burlington on Ellerth's hostile work environment claim, holding that Burlington did not have knowledge of Slowik's alleged harassment and therefore was not negligent in failing to prevent it. (App., *infra*, 285a)

Ellerth appealed the district court's ruling to the Seventh Circuit. A three-judge panel of the court of appeals reversed the district court and held that Ellerth had presented sufficient evidence to proceed to the jury under either a *quid pro quo* or a hostile work environment theory. With respect to the former theory, the panel found that Slowik's comments constituted *quid pro quo* propositions which were themselves actionable, notwithstanding the fact that they did not induce Ellerth to submit to Slowik's sexual advances and Slowik never followed through on his implicit threats of retribution. (App. *infra*, 220a-221a) Burlington successfully petitioned the Seventh Circuit for rehearing en banc and the panel opinion was vacated.

On rehearing en banc, the Seventh Circuit issued a per curiam opinion reversing the district court in which Judges Flaum, Kanne, Cudahy, Coffey, Posner, Manion, Easterbrook and Wood each issued separate opinions. In the per curiam portion of its opinion, the court declared, "[u]nfortunately, a majority of the judges has not converged upon a single rationale for the resolution of all of the issues in these cases." (App., *infra*, 2a) The court further postulated, "[p]erhaps in some future cases this court will be able to forge a majority position; perhaps the Supreme Court will bring order to the chaotic case law in this important field of practice." (App., *infra*, 7a)

However, a majority of the judges concurred in the panel's view "that liability for *quid pro quo* harassment is strict even if the supervisor's threat does not result in a company act," i.e., does not result in some adverse employment consequence. (App., *infra*, 7a) Based on this principle, the court held Slowik's alleged *quid pro quo* propositions[4] to be a sufficient basis for Ellerth to defeat summary judgment on her *quid pro quo* claim.[5]

Writing for a plurality of four judges, Judge Flaum held that "a clear and serious *quid pro quo* threat alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable

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[4] Specifically, the panel based this finding on Slowik's alleged comment over the telephone that he did not have time for Ellerth "unless [she] want [ed] to tell [him] what [she was] wearing." (App., *infra*, 221a)

[5] A majority of judges found that Ellerth had waived her hostile work environment claim on appeal and therefore affirmed the district court's entry of summary judgment with respect to that theory. (App., *infra*, 6a)

claim even if the threat remains unfulfilled." (App., *infra*, 17a) Judge Flaum opined that this conclusion was consistent with principles of agency law which hold a principal liable for its agent's exercise of delegated authority and with the intent of the 1991 amendments to the Civil Rights Act which provide compensation for emotional damage. (App., *infra*, 17a-18a) Judge Flaum also declared that imposing strict liability on employers for the unfulfilled *quid pro quo* propositions made by their supervisory employees would further the goals of deterrence:

> [T]here is no justification for distinguishing between those cases in which a supervisor carries through on his threats from those cases in which the employee either submits to the supervisor's demands or in which the supervisor does not act upon his threats. Liability in this situation serves the goal of preventing such abuse from occurring by creating incentives for companies to take steps in hiring and training for their supervisors.

(App., *infra*, 18a)

Chief Judge Posner and Judges Kanne, Manion, Easterbrook and Coffey each submitted separate concurring and dissenting opinions in which they rejected Judge Flaum's view that a supervisor's unfulfilled threats amounted to *quid pro quo* sexual harassment for which an employer could be held strictly liable. Chief Judge Posner reasoned that the strict liability standard should apply only to "company acts," which he defined as "an act that significantly alters the terms or conditions of employment of the victim of sexual harassment." (App., *infra*, 54a) It is only these acts, Chief Judge Posner stated, which are within an employer's

reasonable ability to monitor and control. (App., *infra*, 51a) It would be inappropriate to apply standards of strict liability to "non-company acts" such as unfulfilled threats of job retaliation because this conduct is "outside the channels in which action by supervisors is realistically controllable by their superiors." (App., *infra*, 53a) Chief Judge Posner noted that other circuits have adopted this approach to sexual harassment claims. (App., *infra*, 52a)

In his opinion, Judge Coffey wrote that *quid pro quo* harassment, by its very definition, requires "something for something," that is, an exchange linking an economic benefit to participation in sexual conduct. (App., *infra*, 95a) Thus, a plaintiff claiming *quid pro quo* sexual harassment must allege that she suffered a materially adverse employment action due to the harassment. (App., *infra*, 95a) Judge Coffey also noted that none of the cases relied upon by Judge Flaum in advancing his "attempted *quid pro quo* harassment" doctrine involved merely unfulfilled threats of retaliation. Rather, in each of those cases, the employee either submitted to the supervisor's advances or suffered tangible consequences for refusing to do so. (App., *infra*, 100a-101a)

Judge Coffey also dissented from the majority's holding that *quid pro quo* sexual harassment cases should be judged under a strict liability standard. This standard, said Judge Coffey, was explicitly rejected by this Court in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1985). (App., *infra*, 64a) In accordance with Meritor, Judge Coffey advocated that employer liability in all sexual harassment cases be governed by a negligence standard. (App., *infra*, 68a-69a) Judge Coffey also contended that the "traditional, tested, true, logical and common-sense parameters of the negligence standard" are better suited for balancing the

interests of employers and workers than the "blunt legal instrument" of strict liability which would "hold [employers] liable for the improper conduct of their supervisory employees regardless of the circumstances." (App., *infra*, 128a)

SUMMARY OF REASONS FOR GRANTING THE WRIT

A conflict exists among the circuit courts of appeals over the elements of a *quid pro quo* sexual harassment claim under Title VII. Specifically, the circuits are divided over whether a plaintiff must establish that the harassment affected tangible aspects of the terms and conditions of employment in order to establish *quid pro quo* sexual harassment. In the instant case, the Seventh Circuit became the first court to directly hold that a supervisor's threat of retaliation linked to sexual advances is in itself sufficient to state a *quid pro quo* claim, even if the employee did not submit to the advances and suffered no adverse job consequences. The Third and Ninth Circuits have also held, in dicta, that *quid pro quo* harassment occurs whenever a supervisor intertwines a request for the performance of sexual favors with a discussion of actual or potential job benefits.

The D.C. Circuit has reached the exact opposite conclusion, holding that threats alone do not amount to *quid pro quo* harassment in the absence of tangible effects on employment. The First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have each held that *quid pro quo* sexual harassment requires proof of tangible work-related detriment or economic injury. District courts in these circuits have accordingly refused to recognize unfulfilled retaliatory threats, without more, as giving rise to *quid pro*

quo claims. The Second Circuit has also indicated that *quid pro quo* sexual harassment requires either submission to a supervisor's sexual advances or tangible job detriments related to the employee's refusal to submit.

In addition, the strict liability standard which the Seventh Circuit held in the instant case applied to all *quid pro quo* sexual harassment claims is inconsistent with the language and spirit of this Court's holding in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), which rejected the principle that employers are automatically liable for sexual harassment committed by their supervisors. Under the principles announced by this Court in Meritor, a strict liability standard is particularly inappropriate in *quid pro quo* sexual harassment claims predicated on mere unfulfilled threats, rather than tangible job detriments, because employers have no effective means of monitoring the "non-company acts" of their supervisors.

Each of these issues is of substantial importance to the administration of Title VII. The standard of liability which is applied to Title VII claims obviously has a significant bearing not only on the outcome of employment discrimination cases but on the factual issues which must be addressed in those cases. The relative scope of the two branches of sexual harassment, *quid pro quo* and hostile work environment, in turn determines the standard of liability to be applied. The proper construction of Title VII is relevant both to the employees who rely upon the act to create and maintain a workplace free from unlawful discrimination and harassment and to employers who must design and implement policies and procedures to eradicate sexual harassment in order to protect themselves from liability.

The Seventh Circuit's splintered per curiam opinion in the instant case typifies the difficulty which courts have had in grappling with the elusive distinctions between *quid pro quo* and hostile work environment sexual harassment, the proper legal standards to be applied under Title VII and the balance which must be maintained between the sometimes competing interests of employees and employers. As a consequence, the Seventh Circuit has, in the instant case, expressly requested this Court's valuable guidance in resolving the issues raised in this Petition.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT REGARDING WHETHER *QUID PRO QUO* SEXUAL HARASSMENT REQUIRES TANGIBLE EFFECTS ON THE TERMS AND CONDITIONS OF EMPLOYMENT OR WHETHER THREATENED EFFECTS ARE SUFFICIENT

In the instant case, the Seventh Circuit has rejected the rule adopted by a majority of circuits which requires a plaintiff to prove, as an element of a Title VII *quid pro quo* sexual harassment claim, that the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment. Instead, the Seventh Circuit has held that "a clear and serious *quid pro quo* threat alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled." (App., *infra*, 17a) The court has further held that "a supervisor's *quid pro quo* threat, i.e., a threat that clearly conditions concrete job benefits or detriments on compliance

with sexual demands, can be imputed to the employer for purposes of liability." (App., *infra*, 17a) Thus, in the Seventh Circuit, an employer may be held strictly liable under Title VII for *quid pro quo* sexual harassment although the plaintiff neither submitted to a supervisor's sexual advances nor suffered any adverse job consequences from refusing to do so. The employer's liability would attach the second the words are uttered.

The Seventh Circuit is not alone in this view. Approximately one month before the Seventh Circuit issued its en banc opinion in this case, the Third Circuit decided Robinson v. City of Pittsburgh, ___ F.3d ___, No. 95-3594, 1997 WL 386102 (3d Cir. July 14, 1997).[6] There, the Third Circuit adopted the definition of *quid pro quo* sexual harassment set forth in the Guidelines of the Equal Employment Opportunity Commission. Those guidelines state, in pertinent part:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals . . .

[6] Although Robinson was decided before the instant case, it is not cited by any of the eight judges contributing separate opinions to the Seventh Circuit's lengthy decision.

29 C.F.R. § 1604.11(a). Based on these standards, the court held, "a *quid pro quo* violation occurs at the time when an employee is told that his or her compensation, etc. is dependent upon submission to unwelcome sexual advances. At this point, the employee has been subjected to discrimination because of sex. . . . Whether the employee thereafter submits to or rebuffs the advances, a violation has nonetheless occurred." 1997 WL 386102 at *7.[7]

The Ninth Circuit has likewise adopted the EEOC Guidelines as the standard for defining *quid pro quo* sexual harassment. Heyne v. Caruso, 69 F.3d 1475, 1478 (9th Cir. 1995); Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994). In Nichols, the court stated that "*quid pro quo* sexual harassment occurs whenever an individual explicitly or implicitly conditions a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct." 42 F.3d at 511. The court further held "that a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes *quid pro quo* sexual harassment." Id. at 513. Thus, the Ninth Circuit has clearly signalled that a supervisor's unfulfilled retaliatory *quid pro quo* threat would be sufficient to trigger the strict liability standard.[8]

[7] This conclusion was not necessary, however, to the Third Circuit's holding in Robinson. There, the court found that the plaintiff, a police officer, had been prevented from transferring to a detective division due to her refusal to engage in sexual relations with a superior officer. 1997 WL 386102 at *8. Therefore, the supervisor's *quid pro quo* threats had affected tangible aspects of the plaintiff's employment.

[8] As in Robinson, both Heyne and Nichols involved circumstances where the employee either submitted to the supervisor's sexual advances

(continued...)

The Seventh, Third and Ninth Circuits are, however, in the minority. In Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995), cert. denied, 116 S.Ct. 569 (1995), the District of Columbia Circuit rejected an employee's *quid pro quo* sexual harassment claim where the employee had produced no evidence that her supervisor's sexual advances had any tangible effects on her employment. There, the plaintiff's supervisor first promised that he would "make her job easier" if she would have sex with him and then threatened various reprisals, including termination, if she refused to have sex with him. 59 F.3d at 1393-94.

The D.C. Circuit nonetheless held that the plaintiff could not state a *quid pro quo* claim against her employer because she had adduced no evidence that the supervisor's threats were ever carried out. Id. at 1396. The court declared, "it takes more than saber-rattling alone to impose *quid pro quo* liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." 59 F.3d at 1396. The absence of such consequences in that case precluded the plaintiff from proceeding under a *quid pro quo* theory.

The First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have defined *quid pro quo* harassment consistently with the holding in Gary. Each of these circuits has eschewed the EEOC Guidelines' definition and has held

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[8](...continued)
or was subjected to adverse employment consequences. Heyne, 69 F.3d at 1478-79; Nichols, 42 F.3d at 513. The Seventh Circuit is therefore the first circuit court to actually recognize a *quid pro quo* harassment claim where the plaintiff neither submitted to the advances nor suffered tangible effects on the terms of employment.

that an essential element of a *quid pro quo* claim is that the harassment affect tangible aspects of the plaintiff's employment. Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) (an essential element of *quid pro quo* harassment is that the employee "was subject to unwelcome sexual advances by a supervisor or teacher and . . . that his or her reaction to these advances affected tangible aspects of his or her compensation, terms, conditions or privileges of employment . . . ."); accord Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990) (quoting Lipsett); Spencer v. General Electric Co., 894 F.2d 651, 658 (4th Cir. 1990) (essential element of a *quid pro quo* sexual harassment claim is that "[t]he employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment"); Ellert v. University of Texas, at Dallas, 52 F.3d 543, 545 (5th Cir. 1995) (*quid pro quo* harassment claim requires proof that the employee's "reaction to the harassment affected tangible aspects of the terms and conditions of her employment"); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 187 (6th Cir.), cert. denied, 506 U.S. 1041 (1992) (requiring in a *quid pro quo* claim that the plaintiff's reaction to the harassment have affected tangible aspects of employment and permitting employer to rebut plaintiff's allegations by showing that the harassment had no tangible affect on terms and conditions of employment); Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995) (employee must prove that "submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment"); Sauers v. Salt Lake County, 1 F.3d 1122, 1127 (10th Cir. 1993) (claim for *quid pro quo* harassment may lie only "[i]f the plaintiff can show that she suffered an economic injury from her supervisor's actions"); accord Hicks v. Gates Rubber Co.,

833 F.2d 1406, 1414 (10th Cir. 1987) ("[t]he gravamen of a *quid pro quo* sexual harassment claim is that tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from the employee's refusal to submit to the conduct"); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1564 (11th Cir. 1987) (element of *quid pro quo* harassment claim is "that the employee's reaction to the harassment complained of affected tangible aspects of the employee's compensation, or terms, conditions or privileges of employment").

The Second Circuit has likewise consistently defined *quid pro quo* sexual harassment as requiring proof that the plaintiff was denied an economic benefit due to the rejection of a supervisor's sexual advance. Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 142 (2d Cir. 1993), cert. denied, 510 U.S. 1164 (1994); Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992); Carrero v. New York City Housing Authority, 890 F.2d 569, 579 (2d Cir. 1989). Although the Second Circuit expanded the scope of *quid pro quo* harassment in Karibian v. Columbia University, 14 F.3d 773 (2d Cir.), cert. denied, 512 U.S. 1213 (1994), by holding that loss of an economic benefit is unnecessary where the employee has submitted to the supervisor's sexual demands, the court specifically stated that this holding was consistent with Kotcher and Carrero. 14 F.3d at 778-79. Thus, it appears that the Second Circuit also requires either submission to a supervisor's sexual advances or a tangible job detriment in order to make out a *quid pro quo* claim.

Although these courts of appeals have not had the opportunity to consider a case where the plaintiff attempts to base a *quid pro quo* harassment claim solely on unfulfilled

retaliatory threats, district courts in these circuits have rejected such claims. See Johnson v. Runyon, 928 F. Supp. 575 (D. Md. 1996) (granting summary judgment in favor of employer on a *quid pro quo* harassment claim because the plaintiff had failed to prove that her refusal to sleep with her supervisor was the cause of her negative evaluations); Cuesta v. Texas Dep't of Criminal Justice, 805 F. Supp. 451, 457 (W.D. Tex. 1991) (holding that a supervisor's repeated remark to a female employee that "I'll take care of you if you take care of me" did not create grounds for a *quid pro quo* claim where the remarks did not result in a tangible job detriment).

The disagreement between the circuits creates a substantial risk of inconsistent outcomes in sexual harassment cases brought under Title VII. Presently, in a majority of federal courts, if a plaintiff cannot show that a supervisor's alleged sexual harassment had tangible effects on the terms and conditions of employment, the conduct is actionable only under a hostile work environment theory. Under the negligence standard applicable to hostile work environment claims, the employer may defend itself by showing that it neither knew nor had reason to know of the harassment and that it reacted reasonably upon learning of the plaintiff's allegations. However, in the Third, Seventh and Ninth Circuits, if an employee alleges that a supervisor linked his or her sexual advances to job-related benefits or detriments, the employer becomes strictly liable and must prove that the conduct never occurred in order to avoid liability.

The majority approach to *quid pro quo* sexual harassment is more sound and better balances the interests of employees and employers. Assuming, arguendo, that strict liability is the proper standard to be applied to *quid pro quo*

sexual harassment claims,[9] the rationale for applying the standard is that, under agency principles, when a supervisor implements an employment benefit or detriment based upon an employee's receptiveness to sexual advances, the supervisor is using the authority delegated by the employer and therefore acts as the employer. (App., *infra*, 12a); see also Kotcher, 957 F.2d at 59; Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989.) In such circumstances, the employer knows or should know of the decision because, to borrow Chief Judge Posner's terminology, the supervisor has engaged in a "company act." (App., *infra*, 51a)

The same is not true when a supervisor threatens retaliation due to an employee's rejection of his or her sexual advances, but fails to act upon these threats. Here, the supervisor has not actually used any authority delegated by the employer; at most, he has only contemplated doing so. Because employers cannot monitor every interaction between supervisors and their subordinates, they cannot be aware of a *quid pro quo* threat because no actual job action has occurred. Imposing strict liability in such circumstances would create a draconian burden on employers who are already taking extensive measures to combat harassment. This situation is most analogous to that of co-employee sexual harassment which creates a hostile work environment in that the employer has not granted or withheld an employment benefit based on sex and will not necessarily be aware of the harassment. In part due to courts' recognition that employers cannot possibly be responsible for every unofficial action taken by their employees in the workplace, a negligence standard applies to hostile work environment

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[9] As further discussed below, Petitioner asserts that the use of this standard is improper and contrary to this Court's decision in Meritor.

claims. (App., *infra*, 22a-23a) For this same reason, an unfulfilled *quid pro quo* threat should be regarded as evidence of a hostile work environment and held to a negligence standard, rather than as independently actionable conduct for which the employer may be held strictly liable.

The Seventh Circuit's categorization of unfulfilled retaliatory threats as *quid pro quo* sexual harassment is also likely to greatly expand the number of sexual harassment claims brought under a *quid pro quo* theory and decrease the number of cases which may be resolved at the summary judgment stage. Whereas under the majority view a plaintiff must produce evidence of tangible damages in order to proceed on a *quid pro quo* claim, if mere threats are indeed actionable as *quid pro quo* harassment, a plaintiff need only allege that a supervisor's offensive conduct was linked to a job detriment or benefit. Thus, many claims which were previously adjudicated under the negligence standard associated with a hostile work environment theory will be transformed into strict liability *quid pro quo* cases.[10] Because these cases will often depend upon resolution of the conflicting testimony of the plaintiff and the accused supervisor, they will be incapable of resolution at the summary judgment stage. The resulting increase in jury trials will further burden the already overtaxed federal judiciary and increase employers' Title VII-related litigation costs.

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[10] It is reasonable to expect that at least some of these "threat-only" *quid pro quo* claims will be of dubious merit.

II. APPLICATION OF A STRICT LIABILITY STANDARD TO TITLE VII CLAIMS IS CONTRARY TO THIS COURT'S DECISION IN MERITOR

A. Under Meritor, a Negligence Standard Should be Applied to All Title VII Sexual Harassment Claims, Including *Quid Pro Quo* Claims

Over ten years ago, this Court addressed the standard of liability which should be applied to sexual harassment claims brought pursuant to Title VII in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). The plaintiff in Meritor claimed that she had "constantly been subjected to sexual harassment" by her supervisor over a four year period. This harassment consisted of repeated requests for sexual relations, uninvited fondling and exposure and several instances of forcible rape. The Court of Appeals had reversed the district court's verdict for the employer on the grounds that the district court had failed to consider plaintiff's claim under a hostile work environment theory as well as a *quid pro quo* theory. The Court of Appeals had also held "that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct." 477 U.S. at 63.

This Court rejected the standard of "absolute" liability advanced by the Court of Appeals. 477 U.S. at 72. Although this Court declined to state a definitive rule governing employer liability under Title VII, it stated that Congress intended for courts to be guided by agency principles in determining the proper standards of liability. Id. This Court held that Congress' decision to define an

"employer" for purposes of Title VII to include an "agent" of an employer "surely evinces an intent to place limits on the acts of employees for which employers under Title VII are to be held liable." Id.

Despite this Court's rejection in Meritor of an "absolute" liability standard for Title VII claims, the Seventh Circuit and other Courts of Appeal have continued to apply a standard of strict liability to certain sexual harassment claims. Under the bifurcated scheme adopted by the Seventh Circuit in the instant case, employers are strictly liable for supervisory *quid pro quo* harassment, but not for hostile work environment sexual harassment. (App., *infra*, 21a-23a)[11]

In his opinion in this case, Judge Flaum concedes that application of strict liability to *quid pro quo* claims is grounded only weakly, if at all, in the traditional agency principles set forth in the Restatement (2d) of Agency. Section 219(1) of the Restatement provides that an employer is liable for the torts of an employee committed while acting within the scope of employment. Section 228(1) in turn provides that conduct is within the scope of an employee's employment if and only if:

> (a) it is the kind he is employed to perform;

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[11] At least seven other circuits have also generally adopted a strict liability standard for *quid pro quo* harassment. See Davis v. City of Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997); Nichols, 42 F.3d at 513-14; Bouton v. BMW of North America, Inc., 29 F.3d 103, 106-07 (3d Cir. 1994); Karibian, 14 F.3d at 777; Sauers, 1 F.3d at 1127; Kauffman, 970 F.2d at 185-86; Steele, 867 F.2d at 1316.

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and;

(d) if the force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (2d) of Agency, § 228(1). As Judge Flaum admits, this test "appears to have little relevance in the sexual harassment setting." (App., *infra*, 12a)

Some courts have also imposed strict liability pursuant to Section 219(2)(d) of the Restatement. This section provides that an employer may be liable for the acts of an employee occurring outside of the scope of employment where "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or was aided in accomplishing the tort by the existence of the agency relation." Restatement (2d) of Agency, § 219(2)(d). However, the circuit courts of appeal have also been divided over the meaning of this provision and its application to Title VII. Compare Bouton, 29 F.3d at 108 (holding that Section 219(2)(d) applies only when the supervisor is acting with apparent authority of the employer) with Karibian, 14 F.3d at 780 (holding that under Section 219(2)(d), strict liability is appropriate where supervisor acts either with apparent authority or pursuant to any authority delegated to him by the employer).

The conclusion which the Seventh Circuit reached in the instant case is that the Restatement approach should be abandoned altogether. (App., *infra*, 12a) Rather, said the

Seventh Circuit, courts should create their own "federal common law" agency principles in the context of Title VII. (App., *infra*, 12a-14a) These principles appear to be based, at least in part, on what standard of liability the court deems to be appropriate. (App., *infra*, 14a-16a) In this case, the Seventh Circuit determined that application of strict liability to supervisory *quid pro quo* harassment would "better serve the goal of deterrence." (App., *infra*, 16a)

The lower courts' confusion over the proper standard to be applied to Title VII sexual harassment and their inability to settle on a single source of agency law to guide this determination signifies, at the very least, that clarification by this Court would be appropriate. Moreover, the Seventh Circuit's inability to support its strict liability standard under the principles of the Restatement and its resort instead to creating "federal common law" suggests that application of a strict liability standards to *quid pro quo* sexual harassment claims is inconsistent with both Congressional intent and with this Court's decision in Meritor.

This Court indicated in Meritor that agency principles should be used to limit employer liability under Title VII. Instead, the Seventh Circuit and other courts appear to be using these principles to expand liability in Title VII cases beyond that authorized by the express language of the statute. Generally, strict liability is applied when a person stands in a unique position to prevent a foreseeable harm to another. See Restatement (2d) of Torts, §§ 519 & 520; Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1963) (discussing application of strict liability to product liability cases). However, as a practical matter, an employer is without the ability to prevent workplace *quid pro quo* sexual harassment. Attempting to

eradicate this problem would require invasive monitoring of the behavior of hundreds or even thousands of supervisory employees performing different functions in different locales, each of whom must be given some level of discretion to perform their jobs. In this context, strict liability places an impossible burden on employers while at the same time encroaching on employee privacy.

This is not to say that employers are powerless to deter or reduce sexual harassment in the workplace or that an employer's inattention to or casual treatment of sexual harassment should not form the basis for liability. However, the adequacy of an employer's efforts in this regard should be judged by a standard of reasonableness, not by whether the employer has been successful in completely stamping out a deeply rooted societal malady. Under a negligence standard, an employer's culpability for supervisory sexual harassment can be assessed in the context of all relevant circumstances. By contrast, the strict liability standard which the Seventh Circuit and other courts have applied focuses only on whether the harassment has occurred, not what the employer could or should have done to prevent it or to prevent it from reoccurring.

The lower courts have adopted a standard of strict liability with respect to supervisory *quid pro quo* sexual harassment claims which has no explicit basis in either Title VII or agency law and appears to be inconsistent with the principles this Court elaborated in Meritor. These courts have been divided among themselves as to the legal basis for imposing this standard. In light of the considerable confusion both within the Seventh Circuit and among lower courts generally since Meritor was decided and the serious questions which exist regarding the propriety of the strict

liability standard, this issue is ripe for revisitation by this Court.

B. A Strict Liability Standard Should Not Be Applied to *Quid Pro Quo* Harassment Claims Which Do Not Involve Either Submission by the Employee or an Adverse Affect on Tangible Aspects of Employment

A strict liability standard is particularly inappropriate with respect to the type of *quid pro quo* claims which the Seventh Circuit recognized in the instant case -- those in which the plaintiff does not allege that she either submitted to a supervisor's sexual advances or suffered any tangible effects on her employment. In a "traditional" *quid pro quo* claim, the plaintiff alleges that an employment decision was made based on his or her willingness or unwillingness to engage in sexual relations with a supervisor. Although Petitioner contends that the application of strict liability is inappropriate in any Title VII context, in a case involving "traditional" claims, the employer will at least have notice of the decision which was made though not necessarily the basis for it. Theoretically, but not in practice, an employer can weed out *quid pro quo* harassment through aggressive scrutiny of promotions, demotions, performance reviews and the like for retaliatory or other impermissible motives. In addition, under these circumstances, the job decision is a "company act," in that the supervisor is actually exercising delegated authority.

As also discussed in Section I above, none of these justifications for a strict liability standard exist where a *quid pro quo* harassment claim is based on an unfulfilled retaliatory threat or other "non-company" act. In these circumstances, the employer will have no official notice nor

any record of the action which gives rise to the plaintiff's claim because no tangible effect on the plaintiff's employment status is necessary to make out such a *quid pro quo* claim. Furthermore, the employer will not have, through its supervisory employee, acted in any official capacity toward the employee. Avoiding liability under a strict liability standard will literally require employers to monitor every interaction between supervisory and other employees. Such scrutiny, even if it could be accomplished, would be prohibitively expensive, functionally impossible and unduly invasive of employee privacy.

Congress simply cannot have intended for Title VII to make employers responsible for the behavior of their supervisory employees at all times and all places. Congress likewise cannot have intended for employers to be liable for actions of which they have no notice and no reasonable means of acquiring notice and which cannot reasonably be imputed to them under agency principles. Thus, even if this Court were to find that some *quid pro quo* sexual harassment claims are entitled to be held to a strict liability standard, there must be limits. This standard should not apply to the types of "threat-only" *quid pro quo* cases which the Seventh Circuit recognized in the instant case.

III. RESOLVING THE PROPER SCOPE OF *QUID PRO QUO* SEXUAL HARASSMENT AND THE PROPER STANDARD OF LIABILITY UNDER TITLE VII IS IMPORTANT TO BOTH EMPLOYEES AND THE BUSINESS COMMUNITY

It is clear that the issues of whether proof of tangible job detriment is necessary to state a *quid pro quo* sexual harassment claim and what standard of liability should be

applied to sexual harassment cases each have important effects on how Title VII is applied to the American workplace. Applying a standard of strict liability, rather than negligence, to such claims shifts the relevant inquiry in Title VII sexual harassment cases from the nature of the proactive measures which the employer has taken to prevent workplace harassment and the diligence of the employer in addressing allegations of such harassment to the simple question of whether the *quid pro quo* threat occurred. The difference in standards will have an outcome-determinative effect on numerous cases. The ease with which employer liability can be established is likely to affect the number of cases filed and the workload of the federal judiciary in administering those cases.

Construing *quid pro quo* harassment to encompass situations where an employee has neither submitted to a supervisor's sexual advances nor suffered any tangible job detriment represents a significant expansion of that doctrine. Broadening the scope of *quid pro quo* harassment will place more sexual harassment claims under the umbrella of strict liability, as opposed to the negligence standard generally applicable to hostile work environment sexual harassment claims.

Thus, the resolution of these questions has substantial implications for both employees and employers. Application of a strict liability standard to sexual harassment claims requires employers to do more than simply utilize reasonable measures to educate their employees about workplace harassment and react swiftly and effectively to known instances of harassment. In order to avoid liability, employers must prevent harassment from occurring at all, which is virtually impossible. Attempting to do so obviously requires pervasive monitoring of supervisor conduct and

rigorous review of employment decisions. Expanding the concept of *quid pro quo* sexual harassment to cover circumstances where an employee has suffered only from sexual advances linked to employment benefits or detriments, as opposed to tangible economic or other detriments, exacerbates this burden.

Obviously, increasing employers' liability for sexual harassment entails significant monetary costs. Diligent employers already incur substantial costs in attempting to create a harassment-free workplace. These expenses include those involved in educating employees as to proper workplace conduct, hiring additional human resources personnel, developing procedures for responding to allegations of sexual harassment, conducting thorough investigations of such allegations and monitoring employment decisions for improper motives. These costs are in addition to the substantial amounts which employers spend each year in defending themselves from liability in existing cases. Further expanding employer liability would make this economic burden overwhelming. While the employers shoulder these costs initially, they are inevitably passed on to shareholders, workers and consumers. Moreover, the burdens which employment discrimination laws place on employers influence employers' decisions to automate production, to outsource duties and to locate operations in foreign countries. Thus, the resolution of the issues raised in this Petition are likely to have economic ramifications far beyond the parties to this case or even Title VII litigants generally.

CONCLUSION

The Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals in order to resolve a conflict among the circuit courts of appeal regarding the elements of a Title VII *quid pro quo* sexual harassment claim, and to clarify the standard of liability to be applied to such *quid pro quo* claims.

Respectfully submitted,

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Appendix

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

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No. 95-3128

ALICE JANSEN,

Plaintiff-Appellant,

v.

PACKAGING CORPORATION OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 94 C 478; Milton I. Shadur, Judge.

ARGUED MAY 15, 1996
REARGUED EN BANC FEBRUARY 25, 1997
DECIDED AUGUST 12, 1997

No. 96-1361

KIMBERLY B. ELLERTH,

Plaintiff-Appellant,

v.

BURLINGTON INDUSTRIES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 95 C 839; Ruben Castillo, Judge.

ARGUED SEPTEMBER 9, 1996
DECIDED NOVEMBER 27, 1996
REARGUED EN BANC FEBRUARY 25, 1997
DECIDED AUGUST 12, 1997

Before POSNER, *Chief Judge*, and CUMMINGS, BAUER,* CUDAHY,** COFFEY, FLAUM, EASTERBROOK, MANION, KANNE, ROVNER, DIANE P. WOOD,*** and EVANS, *Circuit Judges*.

PER CURIAM. We have consolidated for decision two appeals reargued en banc on the same day. Although the makeup of the en banc court is slightly different in the two cases,**** the similarity of the issues has persuaded us to treat the cases together. Unfortunately, a majority of the judges has not converged upon a single rationale for the resolution of all the issues in these cases. The purpose of this per curiam opinion is to describe the cases briefly, to announce the

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* In No. 96-1361 (*Ellerth*) only. Senior Circuit Judge Bauer was a member of the panel before which the *Ellerth* appeal was first argued.

** In No. 95-3128 (*Jansen*) only. Senior Circuit Judge Cudahy was a member of the panel before which the *Jansen* appeal was first argued.

*** All references in this and the accompanying opinions to "Judge Wood" are to Judge Diane P. Wood, not to Judge Harlington Wood, Jr., who did not participate in these cases.

**** See notes * and ** above. Circuit Judge Ripple did not participate in the consideration or decision of either case. All the other active judges participated in the consideration and decision of both cases.

outcomes and indicate the basic lines of agreement and disagreement, to articulate the court's unanimous view with regard to the disposition of the state law issues, and to refer the reader to the separate, signed opinions that follow.

Both cases primarily charge sexual harassment of a female employee by a supervisory employee in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. And in both the plaintiff is appealing from a grant of summary judgment.

In *Jansen*, with which we begin, the plaintiff has additional claims—of retaliation in violation of Title VII and of intentional infliction of emotional distress in violation of the common law of Illinois. The entire court believes that the district judge was right to grant summary judgment for the defendant, Packaging Corporation of America, on both these claims. Some of the alleged acts of retaliation are outside the scope of Jansen's EEOC charge and are therefore waived. As for the other acts, PCA presented noninvidious reasons for them (for example, that Jansen was assigned a lunch hour—one of the alleged retaliatory acts—in order to assure that the phone in her department would be manned at all times). Since Jansen presented neither evidence that these reasons were mere pretexts nor any other evidence from which retaliatory intent could be inferred, the company was entitled to summary judgment. *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 868-69 (7th Cir.1995). As for Jansen's claim of intentional infliction of emotional distress, it is preempted by the Illinois Human Rights Act, which confines claims of "civil rights violation" under Illinois law to proceedings under the Act. 775 ILCS 5/8-111(C). Sexual harassment is one of the civil rights violations specified in the Act, 775 ILCS 5/2-102(D), and Illinois' highest court has held therefore that common law tort claims that depend on allegations of sexual harassment may be brought only under

the Act. *Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill.2d 507, 203 Ill.Dec. 454, 639 N.E.2d 1273, 1276-78 (Ill.1994). Jansen's common law claim of infliction of emotional distress is supported by the identical factual allegations of her Title VII claims and is therefore preempted.

Jansen's principal claim is of sexual harassment in violation of Title VII. She was hired by PCA as a secretary to Al Antoni, the manager of the Tooling Services Department of PCA's Wheeling, Illinois plant. She has presented evidence that he subjected her to undesired and offensive sexual advances. He once intimated to her that he would hold up her raise if she didn't have sex with him. He held it up for a time, but eventually she did receive it and it was made retroactive. The incident with the raise is the core of her claim that she was subjected to what is known in the case law of sexual harassment under Title VII as "quid pro quo" harassment. In addition, she complains that Antoni's repeated advances created a hostile working environment. Reargument in *Jansen* was granted in advance of the release of the panel opinion.

Ellerth was employed in marketing in the Chicago office of the mattress-fabric division of Burlington Industries. Theodore Slowik, the division's vice president for sales and marketing, was not Ellerth's immediate supervisor, and was based in New York; but he was her supervisor's supervisor, and as such saw her in the course of business on a regular basis. He made sexual advances to her over a period of a year or so and from time to time intimated that she would not be promoted or otherwise do well at Burlington Industries unless she submitted to his advances. Ellerth argues that Slowik's conduct placed Burlington Industries in violation of Title VII on both a quid pro quo and a hostile-environment theory.

With regard to Jansen's claim of hostile-environment harassment, the entire court agrees that an employer who is

negligent in the hiring, supervision, monitoring, or retention of the plaintiff's supervisor (Antoni) is liable for the supervisor's sexual harassment and that the plaintiff has submitted enough evidence of PCA's negligence to create a triable issue, so that summary judgment should not have been granted to PCA. All the judges with the exception of Judges Easterbrook, Rovner, and Wood believe that negligence is the only proper standard of employer liability in cases of hostile-environment sexual harassment even if as here the harasser was a supervisor rather than a coworker of the plaintiff. The view of these judges is set forth in Judge Flaum's opinion, which is joined by Judges Cummings, Bauer (as to No. 96-1361 (*Ellerth*)), Cudahy (as to No. 95-3128 (*Jansen*)) (with the reservations indicated in Judge Cudahy's separate opinion), Kanne (with the reservations indicated in Judge Kanne's separate opinion), and Evans; in Chief Judge Posner's opinion, which is joined by Judge Manion; in Judge Manion's opinion, which is joined by Chief Judge Posner; and in Judge Coffey's opinion. Judges Easterbrook, Rovner, and Wood, as explained in Judge Easterbrook's and Judge Wood's opinions, believe that the proper standard of employer liability in all cases of sexual harassment by a supervisor is respondeat superior, provided, however, that the harassment was committed by the supervisor in the course of exercising his actual or apparent supervisory responsibilities, was foreseeable, and subjects the employer to liability under the principles of the applicable state law. The view that the proper standard of care in cases of a supervisor's creation of a hostile working environment is negligence is thus the law of the circuit, as it is the majority's view.

Judge Flaum's opinion concludes that Jansen has a viable quid pro quo claim, as do Judges Easterbrook, Rovner, and Wood, though their route to this conclusion is different, as they do not believe that there should be any different

standard for an employer's liability for supervisors' harassment depending on whether it is hostile-environment harassment or quid pro quo harassment. Chief Judge Posner and Judges Coffey and Manion disagree that Jansen has a viable quid pro quo claim, Chief Judge Posner and Judge Manion because they believe that strict liability for quid pro quo harassment should be limited to "company acts" (such as firing or demoting), as distinct from mere threats, and Judge Coffey because he rejects strict liability in quid pro quo cases and also because he deems Jansen to have waived her quid pro quo claim.

In Ellerth's case, the panel decision, reversing the grant of summary judgment, was issued, 102 F.3d 848 (7th Cir.1996), but, as is our practice, was vacated when rehearing en banc was granted. Judge Wood's opinion for the panel had held that Ellerth had presented enough evidence both of quid pro quo harassment, and of hostile environment harassment by a supervisory employee, to create triable issues, so that summary judgment should not have been granted to Burlington Industries either. All the judges except Judges Easterbrook, Rovner, and Wood believe that the hostile-environment claim was expressly waived by Ellerth in her briefs to the panel and that the dismissal of this claim should therefore be affirmed. All the judges except Chief Judge Posner and Judges Coffey and Manion believe that Ellerth's evidence of quid pro quo harassment was sufficient to create a genuine issue of material fact, thus precluding summary judgment, although the routes to this conclusion are different. As noted earlier, Chief Judge Posner and Judge Manion believe that an employer's liability for quid pro quo harassment should be limited to company acts, as explained in their opinions, as opposed to mere threats by the supervisor, and there were no company acts here. Judge Coffey believes, as also noted earlier, that there is no strict

liability in a quid pro quo case and that there is no proof of negligence on the part of Burlington Industries with respect to Slowik's harassment of Ellerth.

The court's inability to forge a majority position with regard to the proper standard for evaluating an employer's liability for sexual harassment by a supervisory employee means that panels of the court that have similar cases in the future, and the district judges of this circuit on remand in these cases and in similar future cases, will have to determine and be guided by the narrowest grounds for the decisions in these two cases. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). Perhaps in some future case this court will be able to forge a majority position; perhaps the Supreme Court will bring order to the chaotic case law in this important field of practice. In the meantime, it is important for the district courts of this circuit to recognize in this welter of opinions that certain views *do* command a majority within our court: in particular, that the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability, and that liability for quid pro quo harassment is strict even if the supervisor's threat does not result in a company act. These principles will bind the panels of this court and the district courts of this circuit until the Supreme Court resolves the issues.

In accordance with the foregoing discussion, the judgment in *Jansen* is affirmed with respect to the claims of retaliation and intentional infliction of emotional distress, and is otherwise reversed and remanded; the judgment in *Ellerth* is affirmed with respect to the claim of hostile-environment harassment but is reversed with respect to the claim of quid pro quo harassment; both cases are remanded to the district court for further proceedings not inconsistent with this opinion.

FLAUM, *Circuit Judge*, joined by CUMMINGS, BAUER (in No. 96-1361), CUDAHY (in 95-3128), KANNE (in part), and EVANS, *Circuit Judges*. Title VII makes it unlawful for any employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). It is well established that this language encompasses a prohibition on sexual harassment in the workplace. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 63, 64-65 (1986). In *Meritor* the Supreme Court instructed that traditional agency principles should guide employer liability rules in the harassment context. 477 U.S. at 72. The Court also cautioned, however, that "such common law principles may not be transferrable in all their particulars to Title VII." *Id.* Accordingly, while I believe that agency principles should inform and "limit" this court's analysis of employer liability, *see id.*, I share Chief Judge Posner's concern that an undue reliance on the *Restatement 2d of Agency* ("*the Restatement*") could obscure the issues at stake.[1] A frank discussion of the policies underlying this federal imposition of liability upon an employer is necessary.

The original objective of Congress in enacting Title VII of the Civil Rights Act was to achieve equality in employment opportunities through the eradication of discriminatory barriers. *See Griggs v. Duke Power Co.*, 401

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[1] I also second the Chief Judge's observations regarding the wisdom of looking to state law to derive our agency principles. *See* Posner, pp. 35- 38. With the potential for significant differences among state interpretations of agency law, Title VII remedies (available only against an employer) would be heavily dependent upon vagaries of regionalism. In light of the history giving rise to the Civil Rights Act, it is hard to imagine that this was an end envisioned by Congress.

U.S. 424, 430-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). By definition, harassment that alters the terms and conditions of employment—as it must to be actionable, *see Meritor*, 477 U.S. at 67—denies its victims (almost invariably women) an opportunity to succeed equal to that of employees who remain free of such intolerable treatment. To further the goals of the Civil Rights Act, therefore, the imposition of liability under Title VII seeks to deter harassment, and our resolution of this issue, to the fullest extent possible, should be geared toward minimizing its occurrence. *See* 29 C.F.R. § 1604.11(f) ("Prevention is the best tool for the elimination of sexual harassment."). As Congress amended Title VII in the Civil Rights Act of 1991 to permit victims to collect compensatory and punitive damages, *see Williams v. Banning*, 72 F.3d 552, 553 (7th Cir.1995); *cf. Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 461 (7th Cir.1990), liability now serves to compensate victims of harassment as well. Yet the goal of ensuring equal employment opportunities for both men and women dictates that deterrence be the foremost objective.

I.

A.

With this premise as my starting point, I turn first to a discussion of the appropriate standard for employer liability in instances of *quid pro quo* harassment. *Quid pro quo* harassment occurs where "submission to sexual demands is made a condition of tangible employment benefits." *Dockter*, 913 F.2d at 461; *see also Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir.1994) (*quid pro quo* occurs where supervisor "conditions a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct"). Pre-*Meritor*, we held in *Horn v. Duke*, 755 F.2d 599, 603 (7th Cir.1985), that employers were strictly liable for *quid pro quo* harassment perpetrated by their supervisory

employees. Our holding in *Horn* was premised in part on agency law, *see id.* at 605, but was prior to *Meritor*'s explicit directive. Until the panel decision in *Ellerth*, this court had yet to revisit our holding more fully guided by agency principles. *See Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431-32 (7th Cir.1995). In the period since *Meritor*, seven other circuits have stated that an employer should be held vicariously liable for a supervisor's *quid pro quo* harassment under agency principles. *See Davis v. City of Sioux City*, 115 F.3d 1365, 1997 WL 329583, at * 2 (8th Cir. June 18, 1997); *Nichols*, 42 F.3d at 513-14 (9th Cir.1994) (collecting cases); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir.1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), *cert. denied*, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir.1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.), *cert. denied*, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir.1989).[2] I believe this circuit should follow suit.

Agency law supports the imposition of vicarious liability upon employers for supervisory *quid pro quo* harassment. Section 219(a) of the *Restatement* provides that an employer is liable for torts of an employee committed while acting within the scope of his or her employment. We have

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[2] Judge Wood appears to conclude that the Eleventh Circuit's recent en banc opinion in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.1997), abrogates the decision in Steele that employers should be held "strictly liable" for supervisory *quid pro quo* harassment. *See* Wood, p. 178. By my reading, *Faragher* is solely a hostile work environment case and contains no suggestion that *Steele* is or should be overturned. By the same token, I read the Second Circuit in *Karibian* as treating *quid pro quo* harassment and hostile work environment as separate forms of harassment with distinct theories of liability. *Cf.* Wood, p. 178.

previously explained that "[t]he deliberate act of an employee acting within the scope of his authority is the act of the employer, for an employer, at least where it is a corporation, acts only through agents." *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir.1990); *see also Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807, 820 (7th Cir.1986), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 788 (1987); *Horn*, 755 F.2d at 605. Scope of employment, however, is an amorphous term. While Judge Wood in her examination of the subject would hinge the imposition of liability on "scope of employment" delineated by the "meaningful limitation[s]" of section 228 of the *Restatement*, *see* Wood, p. 186, I harbor reservations whether those limitations are indeed instructive.[3]

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[3] Subsection 228(1) reads,

> (1) Conduct of a servant is within the scope of employment if, but only if:
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> (a) it is the kind he is employed to perform;
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> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and;
>
> (d) if the force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

I imagine that subsections (a) and (c) would infrequently be of analytical value in a sexual harassment case, for presumably employers are not in the business of harassment, and it is not conceivable that harassment of an employee will serve the interests of an employer. Moreover, the time and space limitation of subsection (b) has very little meaning in the context of supervisory harassment: the supervisor/subordinate dynamic does not magically dissolve when an employee punches out for the day, for the supervisor resumes a position of authority the very next morning. Subsection (d) I had always understood to be applicable in instances where force is part of the job description (*e.g.*, the proverbial bouncer). Subsection (d) may be transferrable to cases of sexual harassment since, as Judge Easterbrook pointed out in oral argument, statistically speaking, every

Section 228 appears to have little relevance in the sexual harassment setting. In my judgment, reliance on the *Restatement* in this instance is the type of formalism that does not get us far in practice.

In instances of discrimination, courts have relied upon the concept of delegated authority to flush out the term "scope of employment." (Agency purists may choose to recognize "delegated authority" as a wholly alternative theory.) When a supervisor wields the authority actually delegated to him to dole out job benefits and detriments in order to condition such employment consequences upon receipt of sexual favors, "the supervisor, by definition, acts as the company." *Steele*, 867 F.2d at 1316; *see also Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir.1992) ("[T]he supervisor is deemed to act on behalf of the employer when making decisions that affect the [job benefits] of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity."); *Bouton*, 29 F.3d at 106-07 ("Scope of employment liability is often invoked in *quid pro quo* cases because the supervisor has used his authority over the employee's job to extort sexual favors"); *Nichols*, 42 F.3d at 514 ("A harasser is able to grant such job benefits or detriments only because he has . . . authority to do so 'delegated to him by his employer' . . . .") (internal citations omitted). It is my belief that liability for sexual harassment

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employer should anticipate harassment. I cannot envision, however, if given the universality of this expectation, how this subsection functions as a "meaningful limitation." In sum, I am unable to conclude how subsection 228 can be applied with great utility to the bulk of sexual harassment litigation. Nor am I concerned (nor do I seek to make any prediction) that liability will be avoided if the court were to follow Judge Wood's analysis, as has been charged, *see* Wood, p. 187. I simply am of the view that a command to circumscribe liability through subsection 228 would leave the district courts without sufficient guidance.

should stem from the delegation of authority which can be used to harass.[4]

Although we did not formally adopt this "delegated authority" justification in *Horn*, we recognized and explained the argument:

> [B]y delegating power to [a supervisor], the "employer" and [the supervisor] essentially merged; as long as the tort complained of was caused by the exercise of this supervisory power, [the supervisor] should be deemed as acting within the scope of his employment, and the employer should be held liable for the tort.

755 F.2d at 605. We have also noted the argument approvingly in several post-*Meritor* cases, including *Shager*, where we explained that "a supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer." 913 F.2d at 405; *see also Hunter v. Allis-Chalmers Corp. Engine Div.*, 797 F.2d 1417, 1422 (7th Cir.1986). In sum, because a supervisor would be unable to engage in *quid pro quo* harassment without the authority and power furnished by the employer, the supervisor's conduct is properly imputed to the employer. *See Bouton*, 29 F.2d at 107; *see also Meritor*, 477 U.S. at 70-71 (outlining position of EEOC: "where a supervisor

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[4] Judge Wood argues that a supervisor can harass just as an offensive co-worker might. Wood, p. 173. In my view, a supervisor, by virtue of his position in a hierarchy, always possesses a degree of leverage over a supervisee that does not vary with the nature of harassment. This difference in approach informs my view that a "delegated authority" rationale has more relevance to our analysis of supervisory harassment than the less precise "scope of authority." Moreover, this distinction might gain added significance in the context of co-worker harassment cases.

exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them").

These precedential statements and the *Restatement* answer only the question of whether agency law supports the imposition of vicarious liability. The question remains whether the imposition of liability on the employer for *quid pro quo* harassment serves Title VII's goal of deterring sexual harassment. Implicit in this question is whether a negligence standard better serves the objective of deterrence. The imposition of liability beyond that which is likely to deter sexual harassment serves no constructive purpose and unnecessarily imposes costs on employers, costs that are ultimately passed on.

In choosing an appropriate standard of liability, we must ask what it is that we expect employers to do in preventing their employees from engaging in harassment. If courts expect only that companies, once made aware of harassment, will take appropriate remedial measures, negligence would appear the appropriate standard. A negligence standard, which asks whether an employer knew or should have known about an employee's acts of harassment and failed to take appropriate remedial action, *see Baskerville*, 50 F.3d at 432; *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320 (7th Cir.1992); *Guess v. Bethlehem Steel Co.*, 913 F.2d 463, 465 (7th Cir.1990), necessarily focuses on the steps that employers should take in detecting and subsequently correcting harassment. Underlying a negligence theory is the assumption that employers should not be liable for harassment that they could not be expected to detect. Pursuant to a negligence standard for supervisory harassment,

we would presumably require a posted anti-sexual harassment policy, a grievance procedure that allows a complainant to circumvent the supervisory chain of command, and prompt remedial action. *See Baskerville*, 50 F.3d at 432 (discussing "reasonable" company actions in co-worker harassment situation); *see also Meritor*, 477 U.S. at 72-73 (existence of discrimination policy and grievance procedure "relevant" to negligence analysis, but not "necessarily dispositive"). Liability would ensue where the policy or process was inadequate or the handling of an identified harasser was deficient. Regrettably, inherent in this scheme is that an harasser will always possess the opportunity to make at least one *quid pro quo* demand before an employer would incur liability.

While posted policies and grievance procedures are important, I believe that the remedial goals of Title VII demand more. Companies' efforts to deal with sexual harassment should be systemic and proactive, rather than discrete and reactive. We know that companies can implement grievance procedures and discipline wayward employees; but we also know that companies can hire, train, and promote employees with an eye toward preventing undesirable behavior. In the abstract, a negligence standard conceivably could account for a company's systemic efforts to promote a workplace free of sexual harassment. Employers who had not done enough to reduce the likelihood of harassment throughout the workplace would be found negligent, even if they had no notice that a specific employee was a harasser. In reality, a negligence standard tends to focus on a company's response to specific instances of harassment. Yet a company's reasonable response to a known harasser is not necessarily indicative of reasonable efforts to prevent harassment from occurring in the first place. By refusing to allow companies to escape liability,

even in the first instance of supervisory *quid pro quo* harassment, we better serve the goal of deterrence.[5]

Chief Judge Posner warns that if the costs of preventing harassment exceed the harm of the harassment (measured in terms of the harassed employees' recoveries), companies will prefer to pay the occasional judgment rather than to take what he views as unreasonable measures to reform the workplace. *See* Posner, p. 45. This is an important point, for it suggests that there may be limits beyond which a judicially-fashioned rule, despite its good intentions, will have no power to prevent the discriminatory behavior that Title VII is designed to eradicate. I believe, however, that this concern is premised on an overly pessimistic view of companies' ability to influence the working environment. *Cf.* Coffey, p. 124. Companies have available a variety of measures—short of installing video surveillance cameras—through which they can both monitor and impact behavior patterns in the workplace. The costs of preventing future harassment essentially represent an investment in long-term freedom from liability. A company faced with recurring liability for harassment perpetrated by its supervisory employees will have an incentive to foster a culture in which harassment is not tolerated.

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[5] The EEOC's "Guidelines on Discrimination Because of Sex" recommend:

> An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f).

B.

Defining an actionable *quid pro quo*, of course, is central to the liability standard. A minority of this court is of the opinion, as was the district court in *Jansen*, that an adverse job consequence is necessary to succeed on a *quid pro quo* claim (this idea takes the guise of "company act" in Chief Judge Posner's opinion). *See* Posner pp. 49-53; Manion, pp. 154-57; Kanne, p. 32. Thus, where the employee submits, or the supervisor turns out to have bluffed, or the harassment is reported before any follow-through on the *quid pro quo* threat, there is no cause of action under a *quid pro quo* theory. I cannot agree: a clear and serious *quid pro quo* threat alters the "terms and conditions" of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled.

Principles of agency law support this construction. Making a clear and unambiguous threat of an adverse job consequence is an exercise of the supervisor's delegated authority, just as actually inflicting the consequence invokes that authority. Included in the supervisor's delegated power to hire, fire, promote, evaluate is the authority to threaten to use that power if certain conditions or requirements are not satisfied. For example, no one would question that a supervisor was exercising the authority entrusted to him if he informed an employee that the employee would be fired if his work did not improve. Thus, a supervisor's *quid pro quo* threat, i.e., a threat that clearly conditions concrete job benefits or detriments on compliance with sexual demands, can be imputed to the employer for purposes of liability. This

position has a toehold in the case law.[6] *Cf.* Posner, p. 51 (citing cases requiring adverse job consequence). It should be noted, that many of the cases stating that an adverse job consequence is an element of a sexual harassment claim were decided prior to the 1991 amendments to the Civil Rights Act, when only equitable relief was available. *See, e.g., Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir.1990); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir.1987); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir.1986). In that context, it arguably made sense to require some realized adverse action. Now that emotional damage is compensable, the scope of quid pro quo should encompass clear unfulfilled threats that cause serious emotional harm.

This construction of an actionable *quid pro quo* serves Title VII's goal of deterrence as well. If the aim is to guard against sexual harassment, there is no justification for distinguishing between those cases in which a supervisor carries through on his threats from those cases in which the employee either submits to the supervisor's demands or in which the supervisor does not act upon his threats. Liability in this situation serves the goal of preventing such abuse from occurring by creating incentives for companies to take steps

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[6] Courts have described a valid *quid pro quo* claim in terms that could encompass a situation based on threats only. *See, e.g., Nichols*, 42 F.3d at 513 ("[W]e conclude that a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes *quid pro quo* sexual harassment."); *Karibian*, 14 F.3d at 778 (2d Cir.) ("The relevant inquiry in a *quid pro quo* case is whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances."); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir.1987) (by "making or threatening to make decisions affecting the employment status of his subordinates," supervisor subjects his employer to strict liability).

in hiring and training their supervisors. And while compensation of the victim may be secondary in overall importance to the goal of deterrence, it is undeniable that an employee can be harmed by an unfulfilled *quid pro quo*. A supervisor's unambiguous communication that adverse job action is imminent if sexual favors are not forthcoming causes the employee real emotional strife. An employee who does not submit may well undergo anxiety, distress, and loss of productivity regardless of whether the threat is carried out. Further, holding employers responsible for threats that clearly condition tangible job benefits upon the receipt of sexual favors and result in injury, even if no adverse job consequences follow, is consistent with the fact that the employee who submits to such a threat is afforded a remedy. *See, e.g., Nichols*, 42 F.3d 503; *Karibian*, 14 F.3d 773. Employees who have the wherewithal to call the supervisor's "bluff" and suffer emotionally as a consequence should not have to go uncompensated, nor should a "bluff" so likely to cause harm go unrecognized by the law. The potential to succeed against a company on a claim of such an abuse of power is no "windfall."

That said, and cabined by *Meritor*'s directive, we must recognize an exception to the rule of vicarious liability for unambiguous *quid pro quo* threats: no liability should result where a victim or plaintiff could not have reasonably believed that it was within the supervisor's power to affect the conditions of the plaintiff's job. As explained above, where the supervisor is using his actual delegated authority, liability may be imposed on the company. An employer may also be held liable where a supervisor's *quid pro quo* threat exceeds his actual authority, but the victim reasonably relies on the

supervisor's threat because of his apparent authority.[7] *See Restatement* § 219(2)(d). Apparent authority, appropriately described by Judge Wood as "the shadow of actual authority," *see* Wood, p. 190, exists only "to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized," and the third person actually believes the agent to be authorized. *Restatement* § 8 cmt. c. Thus, only where it would be reasonable for a victim of harassment to believe that the authority used to harass had been delegated to the supervisor would liability ensue.

II.

I now turn to the employer's liability for a supervisor's creation of a hostile work environment. The Supreme Court has held that Title VII offers protection for a hostile work environment, defined as a workplace "permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' " *Harris*, 114 S.Ct. at 370 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 63, 67 (1986)). Traditionally, plaintiffs alleging and courts assessing sexual harassment have differentiated between *quid pro quo* and hostile work environment claims. *See Meritor*, 477 U.S. at

[7] As there may exist the potential for some misread of this issue, *see* Coffey p. 129 n.37; Manion, pp. 160-64, I want to underscore that my focus is not any apparent authority to harass, which would be an anomaly to say the least, but the apparent authority to alter the terms and conditions of the workplace that makes harassment possible.

65;[8] *Dockter*, 913 F.2d at 458. It could be argued that no principled distinction can be drawn between the two types of harassment in cases where the harassment is perpetrated by a supervisor. In either instance, the supervisor may use the authority delegated to him to harass, for, as Justice Marshall observed in his *Meritor* concurrence, "[a] supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace." 477 U.S. at 76. A minority of this court takes this position and treats sexual harassment under a unified approach informed by the *Restatement*. *See* Wood, pp. 172-78.

I believe sound reasons exist to distinguish between liability standards for *quid pro quo* and hostile work

[8] In explaining the EEOC's definition of hostile work environment, the Supreme Court distinguishes hostile work environment from quid pro quo harassment. *See Meritor*, 477 U.S. at 65. Judge Wood argues that the Supreme Court did not make this distinction in its discussion of employer liability. *See* Wood, p. 176. In *Meritor* such a distinction or clarification would not have been necessary as *Meritor* was resolved as a hostile work environment case. Judge Wood asserts that *Meritor* involved allegations of *quid pro quo* sexual harassment. While I am unable to locate these allegations in the Court's opinion, the original complaint may well have contained such allegations, though no reference to the same are found in the district court opinion. *See Vinson v. Taylor*, No. 78-1793, 1980 WL 100 (D.D.C. Feb.26, 1980). Moreover, the district court found that the plaintiff "was not required to grant Taylor or any other member of Capital sexual favors as a condition of either her employment or in order to obtain a promotion." *Id.* at *7. Thereafter the Court of Appeals considered only the plaintiff's argument under a theory of hostile work environment, *see Vinson v. Taylor*, 753 F.2d 141, 144-46 (D.C.Cir.1985), as did the Supreme Court. *See also Cudahy* p. 29.

environment harassment.[9] My conclusion that harassment of the *quid pro quo* variety should give rise to employer liability is premised on the belief that companies can effectively communicate to their employees the message that such behavior will not be tolerated. Yet when it comes to the hostile work environment, the courts have been hard pressed even to define the phrase. *See Harris*, 114 S.Ct. at 372 (Scalia, J., concurring) (" 'Abusive' (or 'hostile,' which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb 'objectively' or by appealing to a 'reasonable person's' notion of what the vague word means."); *see also id.* at 371 (opinion of the court) ("This is not, and by its nature cannot be, a mathematically precise test . . . but we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."); *Baskerville*, 50 F.3d at 430 ("It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other."); *Nichols*, 42 F.3d 503, 510 (9th Cir.1994) ("Questions relating to love and sex are among the most difficult for society to answer—in or out of the workplace—and courts are hardly experts in the realm. Still, we must find ways to define sexual harassment."). Given this definitional difficulty, as well as the variety of views in society as to what constitutes abusiveness, *see Nichols*, 42 F.3d at 510, I have less confidence in employers' abilities to

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[9] Bifurcation of a complaint in this manner in no way suggests that harassment will always take the form of either hostile work environment or *quid pro quo* harassment. *See* Wood, p. 172. Courts have simply created a mechanism for pleading a case. When faced with a situation such as the instant suits, a plaintiff may plead both theories. Trial courts, recognizing the artificial nature of the distinction, should be liberal in construing EEOC complaints. *See* Wood, pp. 198-99.

communicate a consistent message to their employees regarding what constitutes a hostile work environment. Further, it may not be possible for employers to take the measures necessary to eradicate all arguably offensive conduct from the workplace. Because " 'abusiveness' is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation," *Harris*, 114 S.Ct. at 372 (Scalia, J., concurring), I believe that a more judicious approach is called for when it comes to imposing vicarious liability in hostile work environment cases.

While agency principles may not "limit" the imposition of a stronger standard of liability in the context of a supervisory hostile work environment, *see* Wood, p. 186,[10] we should not lose sight of the purpose of imposing liability on supervisors: deterrence. Because a hostile work environment is difficult to define, employers may be unable to send an unambiguous message to employees. I believe the appropriate inquiry in dealing with this conduct remains whether the company has taken due care to prevent harassment and to respond to complaints of harassment. Traditionally, courts have viewed negligence as a close approximation of what the prevention of harm should cost to the company. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir.1947) (Learned Hand's famous test); see also *McCarty v. Pheasant Run, Inc.*, 826 F.2d 554 (7th Cir.1987) (collecting cases). By its conception, negligence possesses the flexibility to respond by degree to amorphous or variable harms, such as this one.

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[10] Judge Wood, with a broad interpretation of scope of employment, envisions vicarious liability for behavior which would traditionally fall under the rubric of hostile work environment. My view of agency principles, informed by the concept of delegated authority, is not as expansive a basis on which to ground vicarious liability for hostile work environment harassment.

We observed in *Carr v. Allison Gas Turbine*, "the greater the [sexual] harassment—the more protracted or egregious, as distinct from isolated . . . or ambiguous, it is—the likelier is the employer to know about it or to be blameworthy for failing to discover it." 32 F.3d 1007, 1009 (internal citations omitted). Given courts' definitional uncertainty, the cumulative nature of such harassment, and my unwillingness to unfairly penalize an employer, it is best to let the standard of liability remain at negligence.

Further, a negligence standard dovetails with the Supreme Court's construction of hostile environment as "severe and pervasive," so that, in theory, a harassed employee will not be left without a remedy against a complicit company. In the overwhelming majority of cases, a plaintiff will have no cause of action until, at a minimum, two instances of harassment have accrued. If we assume prompt reporting (*i.e.*, reporting at initial stages of harassment),[11] employer liability will be triggered by the very creation of the hostile environment, as the employer will have allowed the harassment to reach the level of "severe and pervasive." As explained above, the law should not tolerate "one free" *quid pro quo* demand. Similarly, the law should not exhibit patience with an employer that permits harassment, once reported, to reach the point where it creates a hostile work environment.

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[11] I believe we must assume prompt reporting. A negligence standard will encourage companies to publicize sexual harassment policies and provide effective grievance procedures. If the culture is such that there is some hindrance to reporting, it will be a factor considered by the courts in determining negligence. Perhaps placing the burden of reporting on the harassed employee and making public this burden through the dissemination of policies will foster an atmosphere where victims of harassment will be more ready to realize their rights. *Cf.* Cudahy, p. 30.

This is not to say that we should ignore the reality that when the authority wielded by supervisors over subordinates is used to create a hostile environment, employees may be less likely to report such harassment. While the appropriate standard for both supervisor and co-worker hostile work environment harassment is negligence, I agree with Chief Judge Posner, *see* Posner, p. 46, that what constitutes due care may not be the same in both cases. Because employers entrust supervisors with authority over other employees who may be abused, harassment by a supervisor is more likely to affect the "terms and conditions of employment." A heightened duty of care should apply both in terms of the machinery available to employees to complain of harassment and in terms of a company's duty to investigate and respond effectively to such complaints. *See Meritor*, 477 U.S. at 73 (grievance procedure flawed because it required reporting to supervisor); *cf. Carr v. Allison Gas Turbine*, 32 F.2d 1007, 1009 (7th Cir.1994) ("It would be unrealistic to expect management to be aware of every impropriety committed by every low-level employee.").[12] This intensified concern for supervisory abuse is implicit in the concept of negligence and in the Supreme Court's multi-factor approach, *see Harris Forklift*, 114 S.Ct. at 371; it is manifest in the Supreme

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[12] Judge Coffey, Judge Manion, and Judge Wood express concern that employers will be "baffled" by this heightened duty of care. *See* Coffey, p. 89, Manion, p. 151, Wood, p. 189. I believe that this heightened duty has been present in courts' approach to supervisory sexual harassment as the supervisory relationship has been for some time a focal point of our concern; it should therefore pose no confusion to employers. Moreover, employers should regularly rethink their responsibility for and approach to the supervisory work environment. If this heightened duty does indeed cause employers pause, I expect it to produce more innovative and thoughtful approaches to this problem from them. I would add that my approach to negligence is in accord with Chief Judge Posner's, joined by Judge Coffey and Judge Manion in this respect.

Court's reaction to Meritor's grievance procedure. Conscious of the power dynamic between supervisor and supervisee and eager for the realization of Title VII's goal, I stress it here.

III.

I conclude with an application of my suggested approach to the facts of these cases, the elaboration of which I leave to the *per curiam* opinion, Chief Judge Posner, see Posner, pp. 53-57, Judge Coffey, *see* Coffey pp. 126-37, and Judge Wood, see Wood, pp. 190-98. Under the standards set forth above, Jansen has created genuine issues of material fact as to whether she was subjected to *quid pro quo* harassment. Although it is by no means a foregone conclusion, a reasonable jury could find that by telling Jansen, "I haven't forgotten your review, it's on my desk," while at the same time patting his crotch, Antoni was conditioning a favorable performance review, and thus a raise, on Jansen's submission to his sexual desires. Because this alleged exchange could constitute a meaningful threat, and there is no evidence as yet that Jansen did not view the threat as real, a reasonable jury could conclude that Jansen was subjected to compensable *quid pro quo* harassment.

Jansen has also shown enough to get before a jury on her hostile work environment claim. Antoni allegedly subjected Jansen to months of sexually suggestive remarks and inappropriate acts and gestures, that could be considered "severe and pervasive." There is evidence in the record that PCA should have been aware of Antoni's campaign of abuse. While Jansen did not complain through official channels initially, she did complain to fellow employees. PCA was on notice that Antoni had allegedly harassed his two previous secretaries. Further, there is evidence that Jansen, like the two previous secretaries, was unaware of any sexual harassment policy at PCA. A reasonable jury, deliberating

under the heightened standard of care applicable in the supervisory context, could find PCA liable.

Ellerth, like Jansen, has put forward sufficient evidence to survive summary judgment on her claim of *quid pro quo* harassment. Her pleadings submitted to the district court, specifically her motion opposing summary judgment together with its accompanying affidavits, while unartful, plainly articulate a basis for a quid pro quo claim. *Cf. Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 533 (7th Cir.1993). This basis is comprised of the following alleged statements made by Slowick to Ellerth. While in the lounge of a hotel where Ellerth had come at Slowick's request during a business trip, after an evening of allegedly ogling Ellerth, Slowick said, "you know, Kim, I could make your life very hard or very easy at Burlington." In a later phone conversation, when Ellerth asked permission to undertake a special project, he said, "I don't have time for you right now, Kim, unless you tell me what you're wearing." In a subsequent telephone conversation, Slowick denied her request and then asked her if she were wearing shorter skirts, as that would make her job "a whole heck of a lot easier." Slowick, at an interview regarding Ellerth's promotion during which he rubbed Ellerth's knee, said he had hesitations about promoting her because she was not "loose enough for him."[13] From these essentially uncontested statements, a reasonable jury could conclude that Slowick was conditioning or threatening to base "the terms and conditions" of Ellerth's employment on Ellerth's catering to Slowick's sexual desires, and thus subjected to her compensable *quid pro quo* harassment.

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[13] I note Ellerth was subsequently promoted.

Ellerth, while perhaps having shown enough to get before a jury on her hostile work environment claim, has waived the right to do so. Before the original panel, Ellerth argued that liability should be imposed for hostile work environment because Slowick "was aided in accomplishing the tort by the existence of an agency relationship." *See Restatement* § 219(2)(d). This argument alone would not prevent recovery under an alternate theory. *See* 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1219 (1990) (theory of the pleading doctrine). Perhaps overly ambitious, however, Ellerth goes farther in her reply brief for the argument *en banc* and disavows any argument that liability should be imposed because of employer negligence. *See Restatement* § 219(2)(b). As I believe liability remains linked to negligence, I join Chief Judge Posner in his assessment that Ellerth has no remedy here. *See* Posner, p. 57.

CUDAHY, *Circuit Judge*, concurring. I participated in this *en banc* rehearing as a member of the panel that originally heard *Jansen* (with Judges Coffey and Flaum). Hence, my participation is limited to that case.

I join Judge Flaum's concurring opinion, and I write primarily to elaborate on what constitutes an appropriately "heightened" duty of care for employers whose supervisors engage in hostile environment harassment. For, as Judge Flaum indicates, there are good reasons for a heightened standard for supervisor misconduct in contrast to the same misconduct by fellow employees.

It may be that Judge Wood's analysis converges with Judge Flaum's on the bottom line. Judge Wood mentions circumstances in which supervisors may exceed the scope of their employment and therefore act without delegated authority. *See* Wood, pp. 188-89. In his negligence analysis Judge Flaum calls for a heightened standard of employer care. *See* Flaum, p. 25; *see also* Posner, pp. 46-7. I doubt that the result in Jansen, for example, would differ under one or the other of these approaches. Nevertheless, it is necessary to distinguish *quid pro quo* from hostile environment claims. The Supreme Court distinguished them in *Meritor* with an implication, at least, that they might better be treated differently. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Justice Marshall, concurring in the judgment in *Meritor*, read the majority opinion this way and objected to "a special rule, to be applied only in 'hostile environment' cases." *Id.* at 77 (Marshall, J., concurring in the result). But the opposite view seemingly prevailed, and we must take our guidance from that fact. The other circuits have taken this lead. *See, e.g., Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.1997) (en banc); *Nichols v. Frank*, 42 F.3d 503 (9th Cir.1994); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103 (3d Cir.1994); *Kauffman v.*

Allied Signal, Inc., Autolite Div., 970 F.2d 178 (6th Cir.1992); *but cf.*, *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir.1994).

That the Supreme Court distinguished the two kinds of harassment claims makes sense. In a *quid pro quo* situation, a supervisor acts with actual or apparent authority when he promises employment goodies or threatens their withdrawal to extract sexual "cooperation." *Quid pro quo* is always a creature of power. It is the classic paradigm of powerful males forcing their wills on vulnerable females. A hostile environment, on the other hand, can be created by persons of equal, or even inferior, status to the victim. Supervisory rank may facilitate it, and power may enhance it, but neither is essential, or even central, to the creation of a hostile environment.

In *Jansen*, the supervisor Antoni allegedly created a hostile environment. Power is not of the essence there, as it certainly is for *quid pro quo* harassment. One can imagine a lesser figure doing almost the same thing as Antoni. But his rank in the company was of considerable help to him in creating a milieu of abuse. It is not easy to articulate exactly how a supervisor's abusive conversation and posturing implicates his authority. Still, the intuition remains that the delegated power certainly helps—just as it helped Antoni. Just as it is the centrality of power and authority that dictates strict liability for *quid pro quo* harassment, it is the shadow of power and authority that dictates a heightened negligence standard for supervisory hostile environment harassment.

The negligence standard used to govern hostile or abusive environment claims involving a supervisor must be negligence as related to a special and demanding duty of care. The standard of care should be somewhat like that imposed on packers of parachutes or open heart surgeons. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF

TORTS § 38, at 208-9 (5th ed.1984); *see also*, e.g., *Rustay v. Consol. Rail Corp.*, 775 F.Supp. 161, 163-65 (D.N.J.1991) (operating railroad requires greater duty of care). Judge Flaum has pointed out a weak link in a negligence approach: the assumption that a system can be built under which victims of supervisory sexual harassment will feel free to report the problem to the company. *See* Flaum, pp. 24-5. There ought to be a presumption that in the reporting system under examination, victims could not reasonably be expected to report their problems (unless, of course, the victim actually did). The employer would have an opportunity to overcome this presumption. But, if no evidence were presented, the presumption would import liability.

Also, under the negligence standard, one of the principal liability issues is whether the employer had actual or constructive notice of the creation of a hostile environment by a supervisor. In *Faragher v. City of Boca Raton*, 864 F.Supp. 1552, 1563 (S.D.Fl.1994), the district court held that, if a situation in the company were sufficiently severe to amount to a hostile environment, it was by the same token sufficiently visible to put the employer on constructive notice. In general, this approach has merit. *See Meritor*, 477 U.S. at 72 (citing with approval *Taylor v. Jones*, 653 F.2d 1193, 1197-99 (8th Cir.1981) (holding employer liable for racially hostile working environment based on constructive knowledge)). I would create a rebuttable presumption that, if a situation attributable to a supervisor is severe enough to create a hostile environment, the employer is on constructive notice that remedial measures are required. The employer, of course, could offer evidence to the contrary.

These two presumptions give concrete meaning to Judge Flaum's call for a heightened duty of care. As I noted at the outset, this view might lead to verdicts not too different from Judge Wood's approach. These presumptions, however,

would respect and reward prudent employers who (1) provide a genuinely protected channel for reporting harassment and (2) remain in close touch with the possibility of harassment by supervisors in their own organizations. The diligent employer will have an opportunity to adduce evidence to this effect and thereby to escape liability.

KANNE, *Circuit Judge*, concurring. I join Judge Flaum's thoughtful opinion—except for reservations in two areas. First, with regard to *quid pro quo* harassment, I do not think an employer should be held strictly liable for mere threats made by a supervisory employee. I agree that our focus should be on deterring sexual harassment, but I believe a negligence standard will adequately do the job. A negligence standard will serve to deter *quid pro quo* threats because employers will rationally seek to avoid liability 1) by establishing policies and procedures to circumscribe improper conduct by supervisors, and 2) by imposing appropriate sanctions against errant supervisors once notified by an employee that a supervisor has made a *quid pro quo* threat. Beyond that, there is not much an employer realistically can do to put a stop to *quid pro quo* threats that do not result in any adverse job consequence. Imposing strict liability for such threats would therefore yield little (if any) greater deterrence and generate significantly greater litigation costs than a negligence standard. Moreover, *quid pro quo* threats may be ambiguous, and if such threats make an employer strictly liable, plaintiffs will attempt to turn all instances of supervisor sexual harassment into "implied threats" in order to take advantage of strict liability's easier burden of proof.

On the other hand, I cannot agree with Chief Judge Posner's position that in her threat-only situation (*i.e.*, without an adverse job consequence) Jansen does not have a viable *quid pro quo* claim. Although strict liability is inappropriate for quid pro quo threats, Jansen should still be able to win on her *quid pro quo* theory if she can prove her employer's negligence in failing to obviate *quid pro quo* threats. *Quid pro quo* claims involving only threats deserve scrutiny for employer negligence because of the qualitatively more oppressive nature of *quid pro quo* harassment. Perhaps the facts here will demonstrate that the employer was not

negligent, but Jansen's *quid pro quo* claim should be remanded along with her hostile environment claim so the district court can make the negligence determinations. Admittedly, in this and many cases involving mere threats, adding a *quid pro quo* claim to a hostile environment claim may not make much practical difference because the supervisor's threat will already be relevant to the hostile environment negligence analysis. In some cases, however, the *quid pro quo* claim will stand alone, and negligent employers should be liable for such *quid pro quo* threats.

My second reservation regarding Judge Flaum's opinion concerns his treatment of hostile environment harassment. I cannot agree with Judge Flaum's language suggesting that employers are under a "heightened duty of care" for instances of supervisor harassment. A negligence standard always entails a fact-specific inquiry regarding what care the parties reasonably should have taken. The training, authority, and control given supervisors by an employer will therefore always enter the negligence equation. Calling this a "heightened duty of care" may suggest to some that employers should be presumed liable for supervisor hostile environment harassment. I cannot endorse any such presumptions that take this type of case outside the normal rules of negligence and further complicate this increasingly difficult issue.

POSNER, *Chief Judge*, joined by MANION, *Circuit Judge*, concurring and dissenting. These cases present the court with difficult and important questions concerning the application of Title VII of the Civil Rights Act of 1964 to sexual harassment by supervisory employees. I agree with the basic approach to these questions, and most of the specific answers to them, in Judge Flaum's concurring opinion. Our most substantial difference concerns the employer's liability, in "quid pro quo" sexual harassment cases, for what I shall call "noncompany acts"; these are illustrated by a supervisor's threat that is not followed up by termination, demotion, or other acts that change the contractual relation between the victimized employee and the employer. I shall explain this difference between us after setting forth a general approach that differs somewhat from his.

When the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), said that "Congress wanted courts to look to agency principles" to determine the liability of employers sued under Title VII for sexual harassment of one employee by another, the Court was not ruling that Title VII incorporates the American Law Institute's *Restatement of Agency*. Obvious as this point should be to any reader of the Supreme Court's opinion—for the opinion states that "common-law [agency] principles may not be transferable in all their particulars to Title VII," 477 U.S. at 72—it hasn't sunk in all the way. One of the briefs in the cases before us actually states, "Since Congress placed a comma after the first clause of § 219(2)(d) [of the *Restatement*]. . . ." The courts do not make this mistake; but the *Restatement* has become their template for analyzing the issue of employers' liability for harassment by supervisors. This is the wrong approach, and I am pleased that Judge Flaum does not follow it.

In saying that it is wrong to rely on the *Restatement*, I do not mean that it is wrong to bring agency principles into the application of Title VII. That is inescapable. Title VII creates a statutory tort of employment discrimination but imposes liability only on the "employer"; what is to count as the employer's discriminatory act, and so warrant a remedy under Title VII, is a question of agency that the federal courts must by default answer as a matter of federal common law. Often courts create a federal common law principle simply by borrowing a part of the law of the state in which the legal dispute arose. That would not be a sound approach here, and a majority of the judges of this court reject it; nor is it the tenor of the Supreme Court's reference in *Meritor* to the judicial role: "Congress wanted courts to look to agency principles." Given that the employer is the only person made liable by the statute, the question of agency is central to its administration, so that to defer to state law could introduce striking geographical disuniformities and indeed would empower a state to nullify Title VII.

It is true that the Supreme Court recently repudiated a comprehensive federal judicial power to create common law, but it was speaking of federal common law in "its strictest sense," *Atherton v. FDIC*, 117 S.Ct. 666, 670, 136 L.Ed.2d 656 (1997), that is, of legal doctrine that could not be construed as interpretive. In *Atherton* it was a standard of care for directors of all financial institutions and had no more warrant than the fact that the institution was federally chartered or insured. Deciding what agency principles shall govern liability under a liability-creating statute such as Title VII is not free-wheeling common-law rulemaking; it is filling a statutory gap, a standard office of interpretation. There is no novelty in formulating federal principles of agency law in interpreting federal statutes that are silent on agency. See, e.g., *Central States Trucking Co. v. J.R. Simplot*

Co., 965 F.2d 431 (7th Cir.1992); *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir.1992). I have not found a case which suggests that liability under Title VII should depend on the agency law of the state where the dispute arose. The parties to the cases before us have not suggested that we take such an approach, and Judge Manion's opinion marshals compelling authority against it.

Both cases before us arose in Illinois, but the parties have not enlightened us about the Illinois law of agency. In fact Illinois courts almost always refuse to hold employers liable for the sexual misconduct of their employees, including their supervisory employees. See *Deloney v. Board of Education*, 281 Ill.App.3d 775, 217 Ill.Dec. 123, 666 N.E.2d 792, 797-98 (Ill.App.1996) (truant officer who molested 16-year-old student); *Randi F. v. High Ridge YMCA*, 170 Ill.App.3d 962, 120 Ill.Dec. 784, 524 N.E.2d 966, 970 (Ill.App.1988) (sexual assault by employee of day-care center on 3-year-old); *Webb v. Jewel Cos., Inc.*, 137 Ill.App.3d 1004, 92 Ill.Dec. 598, 485 N.E.2d 409 (Ill.App.1985) (sexual assault by security officer on suspected shoplifter); *Hoover v. University of Chicago Hospitals*, 51 Ill.App.3d 263, 9 Ill.Dec. 414, 366 N.E.2d 925 (Ill.App.1977) (sexual assault by doctor on patient); *Dockter v. Rudolf Wolff Futures, Inc.*, 684 F.Supp. 532, 535-36 (N.D.Ill.1988) (sexual harassment by manager) (interpreting Illinois law), *aff'd*, 913 F.2d 456 (7th Cir.1990). *St. Paul Fire & Marine Ins. Co. v. Downs*, 247 Ill.App.3d 382, 187 Ill.Dec. 130, 617 N.E.2d 338 (Ill.App.1993), found sexual molestation of a patient by a psychiatrist to be arguably within the scope of the psychiatrist's employment, but based this on the patient's psychological dependence on the psychiatrist, distinguishing the other cases that I have cited. *Id.* at 344. *Downs* belongs to the class of cases, illustrated also by sexual molestation by police officers, as in our recent *West v. Waymire*, 114 F.3d 646, 649 (7th Cir.1997), in which

the employer has entrusted the employee with unique power to molest or otherwise oppress subordinates or members of the public; the distinction between these cases and the ordinary case of sexual harassment by a supervisory employee is stressed in *Deloney v. Board of Education*, *supra*, 217 Ill.Dec. 123, 666 N.E.2d at 799 n. 5. In *Deal v. Byford*, 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267 (Ill.1989), scope of employment was admitted, hence not an issue, and anyway the employee was clearly acting in furtherance of the employer's interests. See *id.* at 270, 272-73. And *Pyne v. Witmer*, 129 Ill.2d 351, 135 Ill.Dec. 557, 543 N.E.2d 1304 (Ill.1989), did not involve an intentional tort.

Green Hills Country Club v. Illinois Human Rights Comm'n, 162 Ill.App.3d 216, 113 Ill.Dec. 216, 514 N.E.2d 1227, 1230 (Ill.App.1987), does hold that an employer is strictly liable for any type of sexual harassment by a supervisory employee, but it bases this holding on an Illinois statute dealing with sexual harassment, 775 ILCS 5/2-102(D), and does not mention the common law of agency. Judge Easterbrook (and Judge Wood by implication) fastens on this statute as the ground for believing that the plaintiffs in our two cases have a good claim, noting the Supreme Court's reference in *Meritor* to the *Restatement of Agency*—though the *Restatement* is limited to common law, *Restatement (Second) of Agency* 3 (1958), so that *Meritor*'s reference to it is not plausibly interpreted as authority for deferring to a state statute. Nor are *Restatements* confined to *state* common law, as my colleague believes. The *Meritor* suit had not been filed in any state, but in the District of Columbia. The Supreme Court neither mentioned this fact nor suggested that the place to look for the agency principles applicable to the case was the law of the District of Columbia. My colleague is right that the "common law of agency has stood the test of time."

But the observation is doubly irrelevant: he forswears reliance on common law principles of agency in favor of a statute that departs from those principles; and they were not, as I shall point out, developed with reference to the novel and atypical tort of sexual harassment.

His argument implies that by a stroke of the pen Illinois could eliminate all Title VII liability in that state that depended on the principles of agency law. This would mean all Title VII liability in which the employer was not a personal participant in the infringement of the employee's rights. A state statute that provided that a decision to fire or take other adverse action against an employee on the basis of her sex would not be imputed to the employer unless the employer's owner or chief executive officer had approved the action would do the trick. My colleague resists this implication, arguing that an attempt by a state to curtail Title VII liability would be preempted by the federal statute. But if as he believes Congress left the formulation of agency principles to the states, there is nothing in Title VII that could conflict with a state's decision to adopt the narrowest of such principles to govern sexual harassment or other forms of discrimination. He says we needn't fear that states might discriminate against Title VII plaintiffs by formulating narrow agency principles because the principles would apply to claims under state law as well as under federal law. But the state statute on which he relies for the agency principles applicable to Title VII sexual harassment suits filed in Illinois is not a general agency or tort statute; it is limited to discrimination. The logic of his position is that a state hostile to discrimination claims could draft a special, and especially narrow, set of agency principles to govern discrimination cases alone.

Just as I do not think that Title VII's silence with respect to the applicable agency principles points us toward the

incorporation of state law, so I do not think that its silence can tell us anything about the *structure* of those principles. It thus cannot tell us whether, as I believe no one thinks (and the Supreme Court seems in *Meritor* to have nixed, see 477 U.S. at 72), the employer should be strictly liable for all acts of sexual harassment on or off the premises (in Ellerth's case, largely off) by all employees, or whether distinctions should be made on the basis of kinds of employee (such as supervisory or nonsupervisory) or kinds of act (such as demotion versus a sexual solicitation versus forcible rape), or some combination of the two.

The *Second Restatement of Agency* (there is no third) was promulgated 40 years ago, before Title VII was enacted and before the concept of sexual harassment had emerged as a distinct legal concept. There is nary a hint in the text or legislative history of Title VII that Congress intended to incorporate the *Restatement* by reference. It would have been loopy to do so. The *Restatements* are intended to provide a compact statement of common law principles. The essence of the common law method of rulemaking is suppleness and flexibility, facilitating adjustment to altered circumstances, and is inconsistent with treating any statement of common law principles as a petrified text.

The provisions of the *Second Restatement of Agency* are designed mainly for two types of case neither of which is before us. The first is the tort committed against a stranger, as where a truck driver employed by the defendant runs down a pedestrian. The second is the contract between a stranger and an agent of the defendant. The *Restatement* does not completely ignore torts committed by one employee against another, see § 473, but it subjects them to the "fellow servant" rule. § 474. This nineteenth-century doctrine excuses the employer from liability for negligent injury of one employee by another. *Farwell v. Boston & Worcester*

R.R., 45 Mass. (4 Met.) 49 (1842). If the absorption of the *Second Restatement of Agency* into Title VII were taken seriously, courts would have to explore the implications of the fellow servant rule for the law of sexual harassment. This they rarely do (but see *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir.1990)), though, as it happens, the position they have arrived at with respect to harassment by coworkers is consistent with the rule. As I shall note in a moment, an employer is not automatically liable for coworker harassment; there is employer liability only if the employer is negligent.

The fellow servant rule might be thought inapplicable to sexual harassment because the rule is invariably stated in terms of the employee's negligent rather than intentional torts, and sexual harassment is intentional on the part of the harasser, that is, of the fellow employee. But the only reason the rule seems to be just about torts of negligence is that the liability of an employer for his employees' intentional torts is so much more limited than his liability for their unintentional (usually, negligent) torts that the employer would rarely have occasion to invoke the rule other than in the negligence setting. The fellow servant rule was applied to an intentional tort in *Gabrielson v. Waydell*, 135 N.Y. 1, 31 N.E. 969 (N.Y.1892), and while it is an old case, most fellow servant cases are old, the fellow servant rule having largely gone down the drain when employers' liability acts and workmen's compensation acts superseded the common law of employer liability for industrial accidents. See *Pomer v. Schoolman*, 875 F.2d 1262 (7th Cir.1989), for a rare modern case.

If the fellow servant rule were sought to be applied to harassment by a supervisory employee, we would have to decide whether the harasser was a "vice- principal," W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 80, p. 572 (5th ed.1984), exercising a nondelegable duty of care,

or merely a "superior . . . servant." *Restatement*, *supra*, § 479. The employer would be liable for the vice-principal's harassment but not the superior servant's. The issue of classification would be made difficult to the point of unreality by the fact that the *Restatement* nowhere addresses sexual harassment of one employee by another, or indeed sexual harassment of any sort. It is impossible to tell from its discussion of nondelegable duties whether the supervisors in our two cases would have been thought vice-principals.

Sexual harassment differs from most other torts, and especially from the most common torts—the deliberate or accidental infliction of physical injury—in being "invisible" or largely so other than to victim and perpetrator. The employer will know whether one of his employees sustains a physical injury on the job; he is much less likely to know that one of his employees is being sexually harassed on the job. The feasibility of an employer's controlling the torts of his employees is, as I shall show, an important consideration in crafting agency principles, and one dependent on the particular tort.

I may be in a minority of judges in not believing (or at least in being willing publicly to deny) that the most fruitful way of approaching a novel issue of law is through seeking analogies in legal doctrines designed with quite other issues in mind. Nevertheless, had the Supreme Court told us to use the *Second Restatement of Agency* as the framework for evaluating sexual harassment under Title VII, I would bow to its command. It did not; but by citing the *Restatement* it gave lawyers and judges a straw to grasp at. The straw has broken in their hand. The *Restatement* turns out to be hopelessly vague in its bearing on the issue of employers' liability for sexual harassment, being vaguely worded and addressed to other issues. So judges can in good faith reach opposite results when they seek guidance in the *Restatement*

to employers' liability for sexual harassment by supervisory employees. See, e.g., *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.1997) (en banc). The judges and lawyers who insist that the *Restatement of Agency* is The Way either are disingenuous, wishing to conceal their true grounds of decision, or are in the grip of the formalist belief that difficult cases can be decided by teasing out the meaning of words in a text composed with other problems in mind, without need to examine the social policies that the law might be thought to be serving. "We condemn *Lochner* as formalistic not because it involves a choice, but because it attempts to describe this choice as compulsion." Frederick Schauer, "Formalism," 97 *Yale L.J.* 509, 511-12 (1988). Since neither the text nor the legislative history of Title VII indicates what agency principles the authors of the statute had in mind, the formalist gropes for another text, finds the *Restatement*, and treats it inappropriately as a surrogate statute.

It is time that we threw away the crutch of the *Restatement* and, recognizing the differences between workplace sexual harassment and the actual subject matter of that antiquated screed, ask as an original matter—as I think the Supreme Court invited us to do in *Meritor* when it (under)stated that the common law of agency might not be fully transferable to sexual harassment—what the best regime of liability would be for these cases. It would be misleading even to speak of applying to this case "the law of agency." That would imply the existence of some ready-at-hand body of rules that we have only to apply to a new set of circumstances. The problem is not application; it is creation. I think it equally question-begging to ask whether a supervisor's conduct is "attributable" to the employer, or whether he may be said to "speak for" the employer, or whether an employer must be deemed to "delegate his common law duties" to his

supervisory employees. These are just additional ways of asking whether the employer should be liable.

I understand the attraction of seeking a textual answer elsewhere, perhaps in local law, as Judge Easterbrook suggests; but this evasion of the occasional duty of judicial creativity will not work either, as I have explained and Judge Manion more fully. We thus cannot avoid the task of trying to create a set of agency principles that will deter sexual harassment without imposing an unreasonable burden on employers. I do not consider the burden of liability on employers a negligible consideration in formulating federal common law rules to govern aspects of employment regulation. Our labor markets are becoming choked by regulation, all well meaning but cumulatively an impediment to the efficient employment of the nation's most valuable economic resource, which is its workers.

I emphasize *deterring* sexual harassment rather than *compensating* its victims because, unlike many torts—and again the clearest illustrations are torts that inflict physical injury—sexual harassment does not usually bring about a significant change in the victim's wealth. The victim may be humiliated and deeply distressed by it; rarely will she (or the very occasional he) be impoverished by it. This is not to say that psychological pain should not figure in the calculation of damages. It should. All I wish to emphasize is that an award of damages in these cases is not *primarily* designed to protect the victim's standard of living. The payment of damages in the usual case of sexual harassment is an instrument for deterring future incidents of such harassment rather than for restoring lost earnings or for financing expensive curative or rehabilitative measures.

There is no novelty in grounding principles of agency on deterrence. A recognized objective of imposing "vicarious" liability for the torts of employees (the liability that goes by

the name of "respondeat superior") is to reduce the amount of tortious behavior. *Hartmann v. Prudential Ins. Co.*, 9 F.3d 1207, 1210 (7th Cir.1993); *Konradi v. United States*, 919 F.2d 1207, 1210 (7th Cir.1990); Alan O. Sykes, "The Boundaries of Vicarious Liability," 101 *Harv. L. Rev.* 563, 570 (1988). Our court has adopted (and it is not alone in doing so) the deterrent perspective as its guide to dealing with cases involving the creation of a hostile environment by the plaintiff's coworkers. The standard of employer liability in those cases is negligence: an employer who knew or should have known about the harassment and failed to take reasonable remedial measures is liable. *McKenzie v. Illinois Dep't of Transportation*, 92 F.3d 473, 480 (7th Cir.1996); *Baskerville v. Culligan International Co.*, 50 F.3d 428, 432 (7th Cir.1995); *Carr v. Allison Gas Turbine Division*, 32 F.3d 1007, 1009 (7th Cir.1994); *Doe v. Lago Vista Independent School District*, 106 F.3d 1223 (5th Cir.1997); *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648, 656 (5th Cir.1997); *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir.1996); *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 966 (8th Cir.1993). The thinking is that if the employer has a realistic opportunity to prevent harassment, he must take it.

But if the goal is deterrence, why, it may be asked, is the standard negligence rather than strict liability? The reason is the infeasibility of an employer's stamping out this sort of harassment without going to extreme expense and greatly curtailing the privacy of its employees, as by putting them under continuous video surveillance. If the victim of sexual harassment complains to a supervisor, or a worker who notices what's going on complains to a supervisor, or the harassment is so pervasive (considering its nature, frequency, and number of victims and perpetrators) that the employer knows or should know about the harassment, the employer

ought to take steps to correct the problem. He has or should have the information; he has only to act upon it. And since everyone knows by now that sexual harassment is a common problem in the American workplace, the employer ought in addition to take, in advance of specific cases of harassment, preventive measures against it, as by adopting and announcing a policy against sexual harassment and creating a discreet and convenient machinery by means of which victims can obtain relief without exposing themselves to retaliation. These are the responsibilities that a negligence standard imposes. They should deter most sexual harassment by coworkers without the courts' subjecting the employer to strict liability. A law that requires the employer to do more than is feasible to control harassment will impose costs without creating deterrent benefits. In the long run, these costs will be borne largely by consumers, in the form of higher prices for the employer's product, and workers, in the form of lower wages (because the higher costs are labor costs). Many consumers and workers are women, so women, who are the principal victims of sexual harassment, will pay a big part of the costs that employers incur as a consequence of excessively harsh principles of employers' liability.

In these circumstances, strict liability would not only be expensive and unnecessary, and possibly regressive as well; it would be futile. If the law imposes liability in harassment cases in which there is no reasonable measure that the employer could have taken to prevent the harassment, the only effect of the law will be to impose extra costs on employers and those with whom they are linked contractually. Employers will prefer paying the occasional judgment to incurring costs that, by definition, exceed the employer's foreseeable liability—by definition because, were the costs less than the expected liability, the failure to incur them would be negligence; it is only when they are greater, so that

the employer would not be negligent for failing to incur them, that strict liability bites. The bite may come out of the hides of innocent workers and consumers, rather than deterring any more harassment than a negligence standard would do.

What this shows is that strict liability doesn't always have the happy result of just deterring a bad practice more effectively than the negligence standard. Sometimes the incremental contribution of strict liability to deterrence is nil or slight, and easily outweighed by the additional costs of a more expansive liability. This is implicit in the rejection of strict liability for coworker harassment cases, a rejection to which I believe all members of this court subscribe.

But the cases in which the issue is the employer's liability for harassment by coworkers are the easy ones. The difficult ones are those in which, as in the cases before us, the harasser is a supervisor rather than a line employee. We must distinguish between two types of sexual harassment by supervisors. In the first type, the supervisor uses or attempts to use his supervisory authority to obtain sexual favors from an employee. This is the domain of what has come to be called "quid pro quo" harassment. In the second type of case, the supervisor does not use or attempt to use his supervisory authority at all. He harasses an employee, but he does so in exactly the same way that an employee who had no supervisory authority would harass another employee. He uses unwanted terms of endearment; he fondles or rubs up against his victim; he displays sex toys or tells dirty jokes; he brags about his sexual skills; he proposes marriage; he threatens to kill himself; in the extreme case, illustrated by *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir.1995), he rapes her. These are modes of harassment equally available to a nonsupervisory employee. The proper standard of employer liability here is negligence, just as in the case of harassment by nonsupervisory employees, because it is as

costly for the employer to police this kind of harassment by a supervisor as it is to police the identical harassment by a coworker. I believe that we all have qualms about *Martin*, the case that carries strict liability for the acts of a supervisory employee to its logical extreme.

Although the standard should be the same in the two types of hostile-environment case, the application of the standard is bound to differ as a practical matter. Even if the supervisor is scrupulous in forbearing to invoke his authority over the employee he is harassing, the existence of that authority is a fact of which the victim is bound to be constantly aware. She is more likely than in a case of coworker harassment to submit and less likely to complain. She may believe that because her harasser is a supervisor he is highly valued by the company and that as a consequence the higher-ups in the company will reject her complaint—will in fact fire her, not the harasser. Because such fears will often be reasonable, due care on the part of employers to prevent sexual harassment by its supervisory employees may require the creation of additional complaint machinery when the complaint is against a supervisor. Whether the employer had complied with this heightened duty of due care would be a jury issue in the first instance.

But I would not go further and impose strict liability on the employer for hostile-environment harassment by a supervisor. The "theory" that by making him a supervisor the employer had clothed him with the appearance of authority to harass employees is empty. Since everyone knows by now that sexual harassment is unlawful, a company that publicizes and enforces a stern policy against sexual harassment has done all that it can reasonably be expected to do to dispel its supervisors' "apparent authority" (to lapse into *Restatement*-speak) to harass. The adequacy of the policy in the circumstances (what if the harasser is the chief executive

officer of the employer?) is a factor to be considered in making the required determination of negligence. There is no need to have a separate standard just because the harasser is a supervisor. Excessive complexity is the bane of American law; we have an opportunity to make it a little simpler.

So much for hostile-environment harassment. Let me turn now to quid pro quo harassment. We have to distinguish between two types of such harassment. In the first, the supervisor brings about a significant alteration in the terms or conditions of his victim's employment. He fires her, or denies her a promotion, or blocks a scheduled raise, or demotes her, or transfers her to a less desirable job location, or refuses to give her the training that the company's rules entitle her to receive. In all these examples the supervisor is using his delegated authority to do a company act. Strict liability is appropriate in this kind of case, because it is likely to deter this kind of sexual harassment more effectively than negligence liability would. The employer who is strictly liable will monitor the exercise of this delegated authority very carefully, knowing that it will be liable if the authority is abused. And this monitoring should be relatively easy to do. For it is usually a mistake for a firm, quite without regard to any potential legal liability, to give a supervisor *unilateral* authority to alter a subordinate's terms or conditions of employment significantly. In well-managed companies, decisions having such consequences are subject to rules, and to review by higher-ups in the company—the industrial equivalent of appellate review. The rules will be more carefully formulated and the supervisor's compliance with them in firing or otherwise hurting a subordinate more carefully reviewed by the supervisor's superiors if the employer is strictly liable for the supervisor's use of his delegated powers to harass subordinates. Courts applying a negligence standard would have great difficulty determining

how closely the supervisor should be supervised. Such questions as how many tiers of review should be provided before an employee can be fired or demoted are not easily answered in terms of reasonableness or due care, the criteria of negligence. The regime of strict liability shifts the responsibility for deciding these questions to the employer, who knows more than judges do about how to control supervisory employees.

Could the argument that I have just sketched be made in support of strict liability for *all* sexual harassment by company employees, including harassment by coworkers? Employers know more than we do about how to extirpate that form of workplace sexual harassment too. True; but courts know, more or less, what is reasonable for the employer to do about hostile-environment harassment— institute a tough policy, disseminate it, establish a procedure by which a worker can complain without fear of retaliation (so don't require that the complaint be made to the man who is harassing her!), respond promptly and effectively to any report of possible harassment. Knowing what the employer should do, the courts have only to decide whether he did it, in order to decide whether he was negligent and should be liable. But when it comes to designing the optimum system for reining in the discretion of supervisory employees, the courts are at sea and it makes sense therefore to shift the responsibility entirely to the employer to create and administer an effective system for the review and control of company actions taken by supervisors in the exercise of their delegated authority.

Strict liability is inappropriate, however, when the supervisor merely makes threats, even if the threats are effective. This is why it is important to distinguish between the type of quid pro quo harassment in which the supervisor actually alters the terms or conditions of his victim's

employment and the type of harassment in which he merely threatens to do so, whether or not the victim yields to the threats. Suppose the supervisor threatens to fire a subordinate unless she'll have sex with him, and she agrees—or refuses and he does not carry out his threat. In either case, because he has not used his delegated authority to commit a company act, there is no way in which a system for vetting such acts would catch him out. In a well-regulated company a supervisor who wants to fire a subordinate has to obtain the approval of higher-ups, as I have said, and they will have an opportunity therefore to determine the bona fides of his proposal. But if he doesn't propose to fire her, whether because she has submitted to his sexual extortion or called his bluff, there will be no proposed action to review. It will be no more feasible for the company to determine what is going on than it would be if the harasser were a coworker who had threatened to steal the victim's work tools if she didn't submit to him.

Romantic encounters, including romantic encounters between supervisors and supervised, are a fact of the workplace. Title VII does not purport to forbid them, and would be quixotic if it did. Many happy marriages have grown out of such encounters. Some of the encounters are abusive from the start, and some start well and turn ugly and engender charges of sexual harassment that sometimes have and sometimes lack merit. The words, the gestures, the other behaviors that differentiate the fully consensual relationship from the coercive relationship will often be invisible to the supervisor's superiors. The yielding to a threat will look no different from the yielding to a lawful proposal. It is only when the threat is carried out that the abusive supervisor does something, such as firing the supervised employee, that the employer will know about and should monitor. It is facile to suggest that employers are quite capable of monitoring a

supervisor's actions affecting the work environment. Large companies have thousands of supervisory employees. Are they all to be put under video surveillance? Subjected to periodic lie-detector tests? Trailed on business trips by company spies? Even the EEOC does not go so far. The culminating recommendation in its "Guidelines on Discrimination Because of Sex" to employers is that they should "develop [ ] methods to sensitize all concerned" to the problem of sexual harassment. 29 C.F.R. § 1604.11(f). This is easy to say, but, as the armed forces have recently discovered to their sorrow, hard to do. It is unrealistic to expect that adopting strict liability in lieu of negligence, a relatively esoteric and marginal change in the law, will do much to create a corporate culture in which sexual harassment is unthinkable. Granted, the problem of monitoring the noncompany acts of supervisory employees is primarily a problem of large employers, for in companies that are at or near the statutory minimum of 15 employees, 42 U.S.C. § 2000e(b), noncompany acts will presumably be visible to top management, creating de facto strict liability. But it is the large companies that are the usual targets of litigation, because of their deep pockets.

The distinction that I am proposing between the harassing supervisor who commits a company act, such as firing, and the supervisor who merely threatens such acts, has at least a footing in the case law. See *Gary v. Long*, 59 F.3d 1391, 1396 (D.C.Cir.1995); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir.1993); *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 62 (2d Cir.1992); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir.1987). There are hints of it in Judge Easterbrook's and Judge Kanne's separate opinions. It is, for sure, not the orthodox approach, see, e.g., *Karibian v. Columbia University*, 14 F.3d 773, 778 (2d Cir.1994); *Highlander v. K.F.C. Nat'l*

Management Co., 805 F.2d 644, 648 (6th Cir.1986); I would go so far as to concede that it has the curse of novelty; but the cases that take the orthodox approach do not explain why they do so, and the approach that I am proposing in its stead is not foreclosed by any decisions of the Supreme Court. The Court in *Meritor* said that Congress intended "to place some limits on the acts of employees for which employers under Title VII are to be held responsible." 477 U.S. at 72. It didn't tell us what those limits are.

We can test my proposed approach by considering its application to other forms of discrimination forbidden by Title VII. The closest parallel is sex discrimination that does not involve harassment in the usual sense. Compare two cases. In one, a supervisor denies a raise to a subordinate because of her sex. In another, the supervisor slaps her because of her sex. In the first case, the supervisor has done a company act, and the company is strictly liable. In the second case, the supervisor has not done a company act, and there is no liability under Title VII unless the employer was negligent in hiring or failing to fire or supervise the employee. In *Restatement*-speak, the supervisor in the second case has not acted in the employer's interest; but that is just a conclusion. The practical reason why the employer is not liable is that the supervisor's act took place outside the channels in which action by supervisors is realistically controllable by their superiors.

The distinction between company and noncompany acts points the way to the proper handling of a theoretical third category of supervisor sexual harassment. That is where the supervisor uses his supervisory authority to create a hostile work environment, perhaps by encouraging his male subordinates to harass his female subordinates. If he does this without committing any company acts, then the case should be assimilated to the ordinary case of noncompany

harassing acts by a supervisor, and the employer's liability should be governed by negligence. If the supervisor commits company acts, then the employer should be strictly liable. As a practical matter, the employer will be liable in almost any case in which a supervisor is orchestrating a campaign of sexual harassment, for the employer will either learn of the campaign or be negligent in failing to notice it.

I do not think it is an objection that my proposed approach might occasionally require applying different standards of employer liability to different conduct of the same supervisory employee, whose sexual harassment of a subordinate might include both company acts and noncompany acts. Suppose a worker got drunk at a company party and on his way out of the building bumped into and injured a customer, then got into his car and on his way home hit a pedestrian, both accidents being due to his drinking. The company would be strictly liable to the customer—respondeat superior would apply—but the pedestrian would have to prove the company negligent in order to establish its liability to him, because the drive was not within the scope of his employment.

My proposed approach is summarized in the following table. The term "company act" signifies an act that significantly alters the terms or conditions of employment of the victim of sexual harassment and "noncompany act" signifies hostile-environment harassment by coworkers or supervisors or the kind of quid pro quo harassment that involves only unfulfilled threats (either because the victim submits or because she calls the supervisor's bluff), so that no company act is committed. The difficult borderline case is that of constructive termination precipitated by a threat. The termination will look to the supervisor's superiors like a voluntary quit. But since there is always some paperwork involved in an employee's quitting, the higher-ups in the

company will have some ability to monitor constructive discharges, and I would therefore impose strict liability in such cases.

LIABILITY FOR SEXUAL HARASSMENT UNDER TITLE VII: A SUGGESTED APPROACH

	By supervisor	**By coworker**
"Company act"	employer strictly liable	N.A.
"Noncompany act"	employer liable only if negligent	employer liable only if negligent

I now apply the suggested approach to the facts of our two cases. In *Jansen* there was no company act and therefore no quid pro quo violation. Antoni did hold up Jansen's performance review and raise for several months, but the review was favorable, the raise was made retroactive, and Jansen herself admits that delays of the length she encountered were commonplace. The delays she encountered were not significant alterations in the terms or conditions of employment—therefore were not "company acts" as I am using that term in order to denote the proper scope of quid pro quo liability. For they were not visible to and therefore corrigible by higher-ups in the company. The tenuous character and trivial consequences of Antoni's threat furnish a practical argument for the limited scope of quid pro quo liability that I am urging.

Jansen has, however, presented enough evidence to establish a prima facie case of hostile-environment harassment. What Antoni did to Jansen over a period of some eighteen months—a barrage of threats and sexual solicitations—was highly offensive, and not mere sexual banter or even the kind of mildly obnoxious vulgarity that we

held in *Baskerville v. Culligan International Co.*, *supra*, did not rise to the level of actionable harassment. The only issue is whether Packaging Corporation should have discovered what was going on. The answer is yes, a tentative yes but one that can be given with enough confidence to defeat summary judgment for the employer. Two previous complaints of sexual harassment had been lodged against Antoni. The second, it is true, was somewhat cryptic; but the company's response to it, which was to counsel Antoni about the company's sexual harassment policy, showed that Packaging Corporation "read" the complaint as one of sexual harassment, as it pretty obviously was. Antoni was also well known to be having sex with another worker, and while this relationship was apparently consensual, the fact that he was married to someone else at the time should have alerted the company to the possibility that he was sexually incontinent. The company's lackadaisical if not perverse reaction to Jansen's complaint (accusing *her* of sexual harassment) is further evidence of the company's negligence with regard to the harassment of female employees.

So the grant of summary judgment to Packaging Corporation with regard to the charge of sexual harassment should be reversed. But the only issue for determination by the jury on remand should be whether the company was negligent in failing to protect Jansen from Antoni. There is, moreover, a serious question whether she can obtain substantial damages, given her failure to complain for eighteen months. We have held that the doctrine of avoidable consequences, on which see, e.g., *Outboard Marine Corp. v. Babcock Industries, Inc.*, 106 F.3d 182, 184 (7th Cir.1997); *Ellerman Lines, Ltd. v. S.S. President Harding*, 288 F.2d 288, 289-90 (2d Cir.1961) (Friendly, J.); Keeton *et al.*, *supra*, § 65, pp. 458-59, is applicable to violations of Title VII as to other torts. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417,

1427 (7th Cir.1986). The precise issue is whether if Jansen had complained sooner the company would have taken effective action. This is uncertain given the lackluster way in which the company responded when she did complain. The uncertainty creates an issue for a jury.

On my view of the scope of quid pro quo liability, *Ellerth* like *Jansen* is purely a hostile-environment case. Slowik was Ellerth's supervisor. It is of no consequence, so far as his supervisory authority over her was concerned, that there was another supervisor in between them; this just shows how much power he had over her, given that he was that much higher in the corporate hierarchy. But he never committed a company act against her, such as denying her a promotion, although he obliquely threatened to do so. Therefore she should have to show that the company was negligent in failing to detect and prevent the harassment. The evidence of negligence is too thin to create a jury issue—so it is no surprise that Ellerth doesn't even argue that Burlington *was* negligent. Although aware of the company's policy against sexual harassment, Ellerth did not complain about Slowik to anyone in the company's human resources department or to anyone else who might have taken corrective action; she did not complain to her supervisor. Unlike Jansen's employer, Burlington Industries had no other sources of information about its supervisor's misbehavior. The fact that Slowik told off-color jokes and commented on Ellerth's legs at a lunch in which a vice-president of Burlington was present could not be thought to put Burlington on notice of probable harassment. The vice-president had no reason to think Ellerth offended by Slowik's banter; not all women would be. (Slowik had also patted Ellerth's knee under the table at that lunch, but there is no indication that this was visible to the vice-president.) Although there is a bit of evidence that Slowik may have harassed another woman employed by

Burlington, there is no evidence that this other harassment came or should have come to the attention of any higher-ups in the company. The fact that Ellerth complained to a few of her fellow nonsupervisory employees (and toward the end to a customer service manager) also did not put the company on notice. The precedents in our court and the other circuits do not authorize the basing of a finding of negligence on such scraps of evidence. See, e.g., *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 447 (7th Cir.1994); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320-21 (7th Cir.1992); *Murray v. New York University College of Dentistry*, 57 F.3d 243, 250 (2d Cir.1995). A case in which the plaintiff does not think enough of her ability to prove negligence to even raise a negligence claim would be a pretty dubious vehicle for going beyond the precedents.

But it is an even weaker case for negligence than I have yet let on. Ellerth's claim that she feared that complaining about Slowik would cost her her job is inconsistent with her claim that she quit the company because Slowik had made her working conditions unbearable. If the choice is to quit the company or complain, you obviously should complain, since if the complaint gets you in trouble you're no worse off than you would have been quitting—unless you are seeking a reference for your next job, and there is no evidence of that in Ellerth's case.

Her action in quitting rather than complaining underscores the importance of agency principles that place appropriate pressure on victims of sexual harassment to protect themselves from harassment by complaining to the harasser's superiors. Tort law in general allocates responsibility for the avoidance of nonintentional injuries (not just for their consequences) to both injurer and victim, rather than to the injurer alone. Sexual harassment is an intentional injury by the harasser, but an unintentional injury (in the usual case and

in the two cases before us) by the harasser's superiors, or in other words by the employer itself. The employer is innocent; the victim is innocent; the optimal system of liability for minimizing sexual harassment requires cooperation by both. Once Ellerth decided that Slowik had made the workplace unendurable, she had nothing to lose and everything to gain by complaining. It follows that as between her and her employer, she was in the better position to prevent the misconduct of her supervisor. Slowik had a responsibility to his principal not to harass Ellerth, but Ellerth had a responsibility to her principal too—a duty to complain about Slowik through proper channels. With rights should come responsibilities.

In any event, Ellerth explicitly waived negligence as a ground for Burlington's liability, and so it is not available as a basis for reversing the judgment in Burlington's favor. In her reply to the petition for rehearing, repeating what she had said earlier in her brief on appeal, Ellerth states, "Appellant [Ellerth], in fact, *agrees* with Burlington that § 219(2)(b) does not apply to this case" (emphases in original). The reference is to section 219(2)(b) of the *Restatement*—the section that makes an employer liable for the torts of his employee if the employer is negligent.

COFFEY, *Circuit Judge*, concurring in part and dissenting in part. I concur with the majority view, set forth in the Court's *per curiam* opinion, that the district judge properly dismissed Jansen's retaliation and intentional infliction of emotional distress claims. Per Curiam Op. at p. 3. I also agree with the majority that in *Jansen* the district judge's grant of summary judgment in favor of PCA should be reversed and remanded in order that a jury might address the *limited* question of whether PCA was negligent with respect to the alleged hostile work environment sexual harassment by Jansen's supervisor. Per Curiam at pp. 4-5. I write separately because I do not agree that an employer who lacks knowledge of harassment by one of its supervisors should be held strictly liable under "agency principles," in spite of the fact that the employer may have had every intention of eliminating such conduct from the workplace, and may even have formulated and publicized a complete sexual harassment policy. I am unable to join with **Judges Posner, Flaum, and Diane Wood,**[1] each of whom, in differing degrees, urges that we use the cases before us as a vehicle for announcing bold and unprecedented Seventh Circuit law that will make employers strictly liable in Title VII cases involving allegations of sexual harassment by a supervisor. I am convinced that the creation of a strict liability standard is contrary to the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), and is at odds with the "agency principles" that the High Court has instructed us to consider in Title VII cases.

Strict liability for *quid pro quo* harassment by supervisors amounts to almost "guilt by association," a concept that is

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[1] I identify Judge Wood in this opinion as Judge Diane Wood, as we have another most distinguished and learned member of the court named Harlington Wood, Jr.

fundamentally unfair as well as being inconsistent with "agency principles." Under a regime of strict liability, the employer—similar to the taxpayer who is assessed a tax deficiency by the IRS—would be presumed guilty, and the traditional presumption of innocence cast aside; thus, the employer would be required to bear the burden of proving his innocence.[2] Because the employer saddled with strict liability would not be permitted to argue that it lacked knowledge of the harassment or that it had in place measures to prevent the same, it would have only a *limited* opportunity to rebut this judicially-created presumption of guilt. In a *quid pro quo case*, for example, the employer could avoid liability by proving that the alleged harassment did not occur, but the many factors that can and should weigh against a finding of *negligence* on the part of the employer (i.e., knowledge, preventive measures, sexual harassment policy) become irrelevant once strict liability is adopted. Judicially legislating a strict liability standard will also serve to increase the volume of Title VII litigation and impose a costly burden on American business that will obviously be passed on to taxpayers, workers, and consumers (as with judicial decisions that have continuously expanded tort liability in the products liability and professional malpractice areas).

With due respect for my fellow judges, the approaches advocated by **Judges Posner, Flaum, Easterbrook** and **Wood** disregard the need for judicial restraint and faithfulness to precedent in this highly-charged area of the

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[2] "Generally speaking, the [IRS'] tax deficiency assessments are entitled to the 'presumption of correctness.' This presumption imposes upon the taxpayer the burden of proving that the assessment is erroneous." *Gold Emporium, Inc. v. C.I.R.*, 910 F.2d 1374, 1378 (7th Cir.1990) (citing *Welch v. Helvering*, 290 U.S. 111, 54 S.Ct. 8, 78 L.Ed. 212 (1933)); *see also* Tax Court Rule 142. The presumption is rebuttable. *McCabe Packing Co. v. United States*, 809 F.Supp. 614, 616 (C.D.Ill.1992).

law, and dramatically tip the very delicate balance of the scales of justice in favor of Title VII plaintiffs.[3] As the Supreme Court noted in *Meritor*, the Congress when it enacted Title VII provided little guidance as to how the statute was to be applied in cases of sexual harassment:

> The prohibition against discrimination based on sex was added to Title VII *at the last minute* on the floor of the House of Representatives. . . . The principal argument in opposition to the amendment was that 'sex discrimination' was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. . . . This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'

Id. at 63-65 (citations omitted). However, "the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95, 105 S.Ct. 1785, 1793, 85 L.Ed.2d 64 (1985). The Court recognized this in *Meritor* when it advocated "agency principles" and concluded "that the Court of Appeals was *wrong* to . . . impose absolute [strict] liability on employers for the acts of their supervisors." *Meritor*, 477 U.S. at 73 (emphasis added).

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[3] Similarly, I note that "the availability of a recovery in tort *without proof of negligence* as a cause of a damaging event has *vastly* improved a [plaintiff's] opportunity for recovery against a manufacturer or other supplier of a product that was involved in such an event." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 99 (Fifth ed.1984) (emphasis added).

We should take our cue from the Supreme Court's *Meritor* decision and, in an exercise of judicial restraint, hold that an employer is liable for a supervisor's acts of sexual harassment under the negligence standard *only if and when the plaintiff can demonstrate that the employer knew or should have known of the alleged harassment and failed to take appropriate measures. Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320 (7th Cir.1992). Additionally, the imposition of vicarious liability might conceivably be proper in that rare situation (not presented in either *Jansen* or *Ellerth*) where a plaintiff is able to establish that the supervisor acted with actual or apparent authority to engage in such conduct. *Restatement (2d) Agency* § 219(2)(a) & (d).

A strict liability standard, in contrast with the more flexible and reasonable negligence standard, will preclude us from accounting for "the circumstances of [each] particular case," *Meritor*, 477 U.S. at 73, including the disparate corporate structures in modern business life. As **Judge Wood** explains, Title VII runs the ambit in its application, reaching small firms with as few as fifteen employees, as well as large entities such as General Motors, with some 692,800 workers. Wood Op. at p. 183. For **Judge Wood** to suggest, however, that a supervisor who stands on the second lowest (the 692,799th) rung of the corporate ladder at General Motors "stands in the place of [his] principal," Wood Op. at p. 184, to the same extent that the lowliest supervisor (the fourteenth employee) does at a fifteen person firm is untenable and reaches beyond reasonableness. To impose strict liability merely because an employee is designated as a "supervisor" in my view disregards the realities and complexities of modern corporate America.

I. EMPLOYER LIABILITY UNDER TITLE VII

A. *Title VII Is Not A Strict Liability Statute*

When called upon to determine when an employer may be held liable under Title VII for sexual harassment by one of its supervisors, we must start with the Supreme Court's clear and unambiguous mandate in *Meritor* that we "look to agency principles." 477 U.S. 57, 77, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). The High Court in *Meritor*, far from endorsing an all-expansive interpretation of "agency principles," specifically rejected strict liability and made clear that agency principles provide a *limitation* on employer liability rather than a blank check for expanding liability. *Id.* Specifically, the *Meritor* Court stated:

> We . . . decline the parties' invitation to issue a definitive rule on employer liability, but we do agree . . . that *Congress wanted courts to look to agency principles for guidance* in this area. While *such common-law principles may not be transferable in all their particulars to Title VII*, Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b) surely evinces an intent to place some *limits* on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that *the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors*. See generally Restatement (Second) of Agency §§ 219-237 (1958).

Id. (emphasis added). *Meritor*'s rejection of strict liability remains the law, and has not been superseded by any precedent from the Nation's highest court, although some courts, in attempting to apply "agency principles," have improperly concluded that strict liability is mandated in sexual harassment cases. Curiously, even **Judge Wood**, who

champions a sweeping strict liability standard, concedes that "the *Meritor* Court viewed agency principles as *limiting*, not expansive, factors in determining liability." Wood Op. at p. 177.

The political winds of change have apparently affected the views of the EEOC regarding employer liability, for while the EEOC, as *amicus curiae*, argued for a negligence standard in *Meritor*, it now urges us to adopt a "strict liability" rule in cases where a supervisor has allegedly harassed a subordinate. The EEOC's former position was that:

> If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, *the employer should be shielded from liability absent actual knowledge of the sexually hostile environment* . . . . In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of this case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.

Meritor, 477 U.S. at 71 (quoting Brief for United States and EEOC as Amici Curiae). *At oral argument, **Judge Wood** attempted to explain away this patent inconsistency between the EEOC's previous and current positions on the grounds that* "Meritor *is ten years old . . . . We have come, you know, a very long way in ten years.*" *Meritor* should be dispositive of the issues before us, and I disagree with the suggestion that we as judges on a United States Circuit Court of Appeals have a license to take the law beyond *Meritor* simply because that decision may not comport with our individual notions of social progress in 1997.

The Supreme Court in *Meritor* also recognized that the "existence of a grievance procedure and a policy against discrimination," while not necessarily dispositive, is "*plainly relevant*" and definitely a fact that should be considered in determining the extent of an employer's Title VII liability. *Id.* at 72-73. The Court's willingness to acknowledge the liability-mitigating effect of an anti-discrimination policy, *even when the harasser is a supervisor*, makes clear that in the interest of justice and fairness, we are bound by a negligence standard in *all* sexual harassment cases, regardless of the perpetrator's rank vis-a-vis his victim.

Because *Meritor* was a hostile work environment case,[4] the Court did not definitively reach the question of an employer's liability for quid pro quo harassment by a supervisor. Nevertheless, there are courts which purport to follow *Meritor* and have "look[ed] to agency principles" as a vehicle to expand *Meritor*'s holding and conclude that strict liability is the proper standard in supervisory *quid pro quo* cases. *See, e.g., Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir.1994) (collecting cases); *but see Nash v. Electrospace System, Inc.*, 9 F.3d 401 (5th Cir.1993) (Title VII is not a "*strict liability*

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[4] I do not agree with **Judge Wood** that *Meritor* involved allegations of *quid pro quo* harassment by a supervisor. Wood Op. at p. 176 While, as **Judge Flaum** notes, the original compiaint may have contained allegations of *quid pro quo* harassment, neither the district court, the Court of Appeals, nor the Supreme Court resolved the case on a *quid pro quo* theory of liability. Flaum Op. at p. 21 n. 8. **Judge Wood's** insistence that *Meritor* presented both a hostile work environment and a *quid pro quo* claim dovetails well with her argument that the two types of harassment are effectively one and the same, and should therefore both be measured under a strict liability standard. Nor should we assume (as **Judge Cudahy** does) that *Meritor*, by "implication," suggested differing standards of employer liability for *quid pro quo* and hostile work environment claims. Cudahy Op. at p. 29.

statute for employers"). Our own post-*Meritor* decisions to date have not specifically addressed the issue of whether an employer is strictly liable for *quid pro quo* harassment by a supervisor, except to state in clear and unambiguous language that this *remains an open question* in light of *Meritor*. As **Chief Judge Posner**, writing for this court, explained just two years ago:

> An employer is not strictly liable for sexual harassment of one worker by another unless, *perhaps*, the harassment takes the form . . . of an abuse of authority, as where a supervisor threatens to fire a subordinate if she refuses to have sex with him. In such cases, a number of courts treat the supervisor as the employer, *whether correctly or not we need not decide.* (*Neither the Supreme Court nor our court has had occasion to decide the question.*) In all other cases, it is clear, the criterion for when an employer is liable for sexual harassment is *negligence*.

Baskerville v. Culligan International Co., 50 F.3d 428, 431-32 (7th Cir.1995) (emphasis added) (citations omitted).

Prior to *Meritor*, this circuit for a brief period adhered to a rule of strict liability, as set forth in *Horn v. Duke*, 755 F.2d 599 (7th Cir.1985). Although my respected colleague **Judge Flaum** relies to an extent upon the reasoning in *Horn* (*see* Flaum Op. at pp. 10-11, 13), this reliance is at best confusing, for the *Horn* case was decided one year *before* the Supreme Court's *Meritor* decision, and *Horn* has since been *called into question* by this court. In *North v. Madison Area Ass'n for Retarded Citizens*, for example, we addressed the proper scope of employer liability in the context of a race-discrimination claim under Title VII, and, in light of *Meritor*, *we disavowed* Horn's *rule of strict liability*. *North*, 844 F.2d 401, 407 (7th Cir.1988). Our post-*Meritor* decision in *North*, though it concerned race discrimination and not sexual

harassment, nonetheless addressed the proper scope of an employer's liability for the discriminatory acts of a supervisor. In *North*, we stated unequivocally that "in light of the decision in *Meritor . . . employers are no longer to be held to . . .* a *strict standard in every case in which the actions of a supervisory employee are in question.*" *Id.* (emphasis added). This court's *North* decision held that in the absence of evidence that the supervisor acted with actual or apparent authority,[5] the employer "could be held liable for discriminatory actions which were attributable to [the supervisor] *only if it knew or should have known of those actions and failed to take reasonable remedial measures.*" *Id.* I am at a loss to understand why this court should wish to reverse course and *re-instate* a strict liability rule that we have held to be improper under *Meritor*.

This court has consistently rejected the strict liability principle in the context of sexual harassment cases involving non-supervisory employees. In *Juarez*, for example, a 1992 opinion **Judge Cudahy** authored, we cited *Meritor* for the proposition that "*[e]mployers are not strictly liable under Title VII for sexual harassment engaged in by their employees*" and we proceeded to analyze the facts of the case under the accepted "knew or should have known" rubric (i.e., negligence). 957 F.2d at 320; *see also Baskerville*, 50 F.3d at 431-32.

In line with the principles enunciated in *Meritor*, we should apply a negligence standard in the cases before us, and in all cases where a plaintiff seeks to hold an employer liable for

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[5] Neither Jansen nor Ellerth argue that their supervisors acted with "actual authority" to engage in sexual harassment, but Jansen does claim that her supervisor acted with "apparent authority." As discussed below, I am of the opinion that Jansen has failed to introduce evidence sufficient to proceed to trial on her apparent authority claim.

acts of sexual harassment allegedly committed by another employee. Notice to the employer (i.e., knowledge) is a key component of the negligence standard. As **Chief Judge Posner** very recently observed (in an opinion which I joined along with **Judge Easterbrook**), an "employer's duty to investigate and if appropriate take remedial measures is not activated *until the employee complains of sexual harassment or information about the harassment comes to the employer's attention* from some other quarter." *Zimmerman v. Cook Co. Sheriff's Dept.*, 96 F.3d 1017, 1019 (7th Cir.1996).[6] What constitutes "appropriate remedial action" depends on the gravity of the alleged harassment in a particular case, the information made available to the employer, and of course, the type of corrective action instituted. *Baskerville*, 50 F.3d at 432 ("Just as in conventional tort law a potential injurer is required to take more care, other things being equal, to prevent catastrophic accidents than to prevent minor ones, so an employer is required to take more care, other things being equal, to protect its female employees from *serious* sexual harassment than to protect them from *trivial* harassment.").

B. *The Nature of Strict Liability*

Before we even think about jettisoning the strict liability doctrine into the law of employment discrimination in this circuit, it is imperative that we examine in some depth the nature of the strict liability doctrine as well as its origins and purpose in tort law. We must analyze and determine in the interests of justice whether strict liability, whatever its arguable merits in other areas of the law, is well-suited to the

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[6] An employer may also be held liable for negligence if it failed to exercise "due care in hiring the offending employee in the first place." *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 46 (7th Cir.1990). Neither Jansen nor Ellerth allege negligence in hiring, nor is there any evidence in the respective records to support such claims.

Title VII context. Under a strict liability theory, *the plaintiff need not establish that the employer was negligent or blameworthy, or that the employer authorized, condoned, or sanctioned harassment in the workplace, for the defendant under this theory is strictly liable, or liable "without fault."* W. Page Keeton et al, *Prosser and Keeton on the Law of Torts* § 75, at 534 (5th ed.1984). *Strict liability or "liability without fault" is the exception rather than the norm* in Anglo- American tort law, for traditionally the doctrine has been confined to those situations where a defendant "engaged in some kind of activity which exposed others to a risk of harm. . . ." *Chicago, Milwaukee St. Paul & Pacific Railroad Co. v. Union Pacific Railroad Co.*, 78 F.3d 285, 290 (7th Cir.1996) (discussing environmental statute which "impose[d] strict liability on an owner of property based merely on ownership without regard to what actions the owner took on the property to cause pollution."). For example, under the common law of many jurisdictions, a party engaged in "abnormally dangerous" or "ultrahazardous" activity that results in harm (such as engaging in blasting with dynamite in a residential area) may be held strictly liable, even though the party engaged in the activity exercised due care to prevent the harm. *See, e.g., Opal v. Material Service Corp.*, 9 Ill.App.2d 433, 133 N.E.2d 733 (Ill.1956); *see also Restatement (Second) of Torts* §§ 519 & 520 (1977).[7]

The rationale for strict liability is most often stated in policy terms, and specifically, *economic* terms. As the California Supreme Court explained in *Greenman v. Yuba Power Products, Inc.*, a landmark products liability decision, "[t]he

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[7] Even jurisdictions that accept the doctrine of strict liability for "abnormally dangerous" or "ultrahazardous" activities apply the doctrine cautiously, recognizing that application of the doctrine is limited by the many factors set forth in § 520 of the *Restatement (Second) of Torts*.

purpose of strict liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." 59 Cal.2d 57, 63, 27 Cal.Rptr. 697, 377 P.2d 897, 901 (1963). In jurisdictions that recognize the doctrine of strict liability for defective products, a company which manufactures a faulty product and places it in the stream of commerce is *presumed* to be legally responsible if harm results from the use of that product, unless the defendant can establish a recognized defense such as assumption of the risk or misuse of the produc.. Louis R. Frumer, et al. 2 *Products Liability* § 8.01 (1997).[8] Strict liability literally *shifts the burden of proof* from the plaintiff to the defendant, reflecting a *policy* judgment that manufacturers, as a general rule, should bear the *costs* associated with defective products that cause harm.

As discussed below, I am convinced that the same cost-shifting rationale which may be argued to support a theory of strict liability for manufacturers of defective products (or those who engage in ultrahazardous activities such as blasting with dynamite) does not justify making employers "strictly liable" for the seemingly intractable *social* problem of sexual harassment. In my view, therefore, the adoption of strict liability in the employment context is not only contrary to agency principles, it also represents a novel, ill-advised, and harmful extension of the doctrine of strict liability that will

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[8] The defenses available to a defendant-manufacturer in a strict products liability action vary from jurisdiction to jurisdiction. There are jurisdictions, for example, that recognize a defense "if a machine, drug, or other product was designed or constructed by a producer in conformity with the 'state of the art' at the time possession was surrendered." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 99 (Fifth ed.1984).

have deep and lasting social and economic consequences. Policy decisions of this magnitude have traditionally been left to the legislative branch of Government, and should remain the province of the people's elected representatives. In fact, Congress has not even *addressed* the issue of an employer's liability for sexual harassment, much less indicated that employers should be held strictly liable under a "cost-shifting" theory. Until such time as Congress—the Nation's true legislature—has spoken on this question, it would be more proper for us to refrain from imposing the far- reaching standard of strict liability by judicial edict.

C. *Critique of Strict Liability Theories*

Before analyzing the strict liability theories outlined by **Judges Posner**, **Flaum**, **Easterbrook**, and **Diane Wood**, let us initially define the term "agency principles." Our duty is to *interpret* the common law of agency, not to *make* new law. We therefore look to the principles set forth in the *Restatement (2d) of Agency*, which was cited in the *Meritor* decision, and in particular § 219 of the *Restatement*. As the trial judge in *Jansen* explained, § 219 delineates three potential theories for holding employers liable for the sexual harassment of their employees:

> **[1]** Section 219(1) holds employers responsible for torts committed by their employees *within the scope of their employment*. . . . **[2]** Under § 219(2)(b), masters are liable for their own negligence or recklessness; in a harassment case, this is typically negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment. **[3]** Finally, under § 219(2)(d), if the servant relied upon apparent authority or was aided by the agency relationship, the master is required to answer.

Jansen, 895 F.Supp. at 1061 (quoting *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106 (3d Cir.1994)). With respect to

the first of these three theories (*respondeat superior liability*), it is crucial to recognize that:

> The liability of an employer for torts committed by its employees—without any fault on his part—*when they are acting within the scope of their employment*, the liability that the law calls "*respondeat superior*," *is a form of strict liability*. It neither requires the plaintiff to prove fault on the part of the employer nor allows the employer to exonerate himself by proving his freedom from fault.

Konradi v. United States, 919 F.2d 1207, 1210 (7th Cir.1990) (emphasis added).

1. *Judge Easterbrook's Approach to Employer Liability*

Judge Easterbrook and **Judge Wood** are of the opinion that state rather than federal law should define the parameters of an employer's liability under Title VII, although none of the parties have urged us to take this curious and novel (indeed, unprecedented) approach. Out of the vast constellation of Title VII cases decided by the federal courts, including those that have addressed the issue of employer liability, I have been unable to locate a *single* precedent that supports the unique position of **Judges Easterbrook** and **Wood** on this choice of law question.[9] In fact, *Meritor*

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[9] Indeed, by adopting an agency standard independent of state law (i.e., negligence), our own decisions have implicitly recognized that the question of employer liability for sexual harassment under Title VII is a matter of *federal* common law. Although **Judge Easterbrook** has participated in some of these decisions, he has not to date even hinted in dicta, much less unequivocally stated, that agency principles in Title VII cases must be derived from state law. *See, e.g., Zimmerman, supra* (employer is not liable for negligence if it lacked knowledge of the alleged harassment). Nor, until today, has **Judge Wood** advocated such a rule. In fact, **Judge Wood's** panel opinion in *Ellerth* analyzed "general agency cases," including state and federal precedents from across the country, and

provides a strong refutation of my colleagues' position, for the Supreme Court in *Meritor* did not qualify or limit the "agency principles" that federal trial courts were to "look to . . . for guidance," much less require that "agency principles" be derived from state law. 477 U.S. at 77.[10]

Judge Easterbrook presents a somewhat abridged version of the Supreme Court's recent decision in *Atherton v. FDIC*, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997), by citing that case for the proposition that "[w]hen a federal statute is silent, we obtain the necessary rule from state law, unless application of state law would undermine a federal norm." Easterbrook Op. at pp. 140-141. *Atherton* does state that "normally, when courts decide to fashion rules of federal common law, the guiding principle is that a significant conflict between some policy or interest and the use of state law . . . must first be specifically shown." *Id.* However, *Atherton* also makes clear that this "guiding principle" is *only* applicable to the creation of " 'federal common law' *in the strictest sense*, i.e., a rule of decision that amounts, *not simply to an interpretation of a federal statute* . . . but, rather, to the judicial 'creation' of a special federal rule of decision." *Id.* (emphasis added). Similarly, in *Northwest Airlines, Inc. v. Transport Workers Union*, the Court noted that:

> *In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is*

there is no suggestion in that opinion that the relevant agency-law principles were to be drawn from the law of a particular state (i.e., Illinois). *Ellerth v. Burlington Industries, Inc.*, 102 F.3d 848, 855-59 (7th Cir.1996), *reh'g granted and decision vacated*, 102 F.3d at 863.

[10] Nor has the High Court looked to state law in more recent cases involving the interpretation of Title VII terminology, as **Judge Manion** points out in his concurrence. Manion Op. at p. 166.

> *fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.*

451 U.S. 77, 79, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981) (emphasis added); *see also United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973) ("[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts."). I agree with **Chief Judge Posner** that "[d]eciding what agency principles shall govern liability under a liability-creating statute such as Title VII is not free-wheeling common-law rule-making; it is *filling a statutory gap*, [which is] a standard office of *interpretation*." Posner Op. at p. 35.

Even if I were to agree with **Judge Easterbrook**'s premise, for purposes of argument, that deciding the question of employer liability requires something more than traditional statutory interpretation, federal common law rules governing employer liability serve the basic "policy or interest" of uniformity. Interposing the statutes and decisional law of the fifty states, as proposed by **Judges Easterbrook** and **Wood**, would make a crazy-quilt of the law and thus grievously undermine the interest in uniformity. Such an approach would make it most difficult, if not impossible, for an employer with plants in more than one state to comply with federal law, obviously necessitating that employers retain knowledgeable local counsel in several states, or even all of them.[11] The Supreme Court has recognized that federal courts may "fill the interstices of federal remedial schemes with uniform federal rules . . . when the scheme in question

[11] Presumably these heightened costs of compliance—like those associated with a strict liability standard—would be passed on to workers and consumers.

evidences a distinct need for nationwide legal standards." *Kamen v. Kemper Financial Svcs., Inc.*, 500 U.S. 90, 97-98, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991); *see also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (recognizing "federal interest . . . in uniformity"); *Wilson v. Garcia*, 471 U.S. 261, 266-69, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (resort to state law would result in "conflict, confusion, and uncertainty" concerning the appropriate statute of limitations in § 1983 cases). As **Judge Manion** points out most persuasively, Manion Op. at p. 166, the Court underscored the need for uniformity in *Community for Creative Nonviolence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), which stated:

> In past cases of statutory interpretation, when we have concluded that Congress intended terms such as 'employee,' 'employer,' and 'scope of employment' to be understood in light of agency law, we have relied on the *general common law of agency, rather than on the law of any particular State*, to give meaning to these terms. . . . *This practice reflects the fact that federal statutes are generally intended to have uniform nationwide application.*

Id. at 740 (emphasis added) (quotation omitted).

Judge Easterbrook suggests that adopting uniform federal rules of decision for employer liability under Title VII is somehow contrary to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), because "there is no free floating [federal] common law." Easterbrook Op. at p. 140. However, "[s]ince *Erie*, no decision of [the Supreme] Court has held or suggested that [the lower federal courts must] borrow[ ] state law to fill gaps in federal substantive statutes." *DelCostello v. Teamsters*, 462 U.S. 151, 160, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) (no "mandatory rule that

we apply state law in federal interstices."); *see also Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176, 63 S.Ct. 172, 87 L.Ed. 165 (1942). As Justice Jackson once explained:

> In some cases [a federal court sitting in a non-diversity case] may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. *Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced.* . . . It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes and is conditioned by them. Within these limits, *federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present.*

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471, 62 S.Ct. 676, 86 L.Ed. 956 (1942) (Jackson, J., concurring) (emphasis added).

I am in full agreement with the majority that the question of employer liability under Title VII should be treated as a matter of *federal* law, and that we should reject what **Judge Manion** aptly labels "a 50-state standard wrapped in local common law." Manion Op. at p. 165. The majority's approach, in contrast with that of **Judge Easterbrook** and **Judge Wood**, is faithful to the principle that "[l]egal rules which impact significantly upon the effectuation of federal rights must . . . be treated as raising *federal* questions." *Burks v. Lasker*, 441 U.S. 471, 476, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979).

2. *Judge Wood's Approach to Employer Liability*

Judge Wood (joined by **Judges Easterbrook** and **Rovner**) purports to follow "general principles of traditional agency law,"[12] and insists that her approach "is not the 'strict liability' that the Supreme Court rejected in *Meritor*." Wood Op. at p. 171 n. 2. However, a careful reading of her entire opinion clearly demonstrates that she has seen fit to go far beyond *Meritor* by endorsing an overly broad strict liability standard that is based upon an unprecedented and (I believe) incorrect expansion of the *respondeat superior doctrine*.

Judge Wood asserts, without support in case law, that the "proper inquiry" in determining whether an employer may be held liable under the doctrine of *respondeat superior* is "whether the supervisor, acting at least in part with the purpose of serving the employer, committed the acts of harassment as he exercised the authority (actual or apparent) the employer conferred on him: hiring, firing, assigning work, disciplining other employees for harassing behavior, and the like." Wood Op. at p. 188 (emphasis added). I have two principal objections to the way Judge Wood has re-fashioned the *respondeat superior* doctrine for purposes of Title VII:(1) her analysis greatly expands the concept of "scope of employment," and (2) it fails to make clear who is (and is not) a "supervisor."

I agree with **Judge Wood** that in determining the scope of an employer's *respondeat superior* liability under § 219,

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[12] Indeed, there are isolated portions of **Judge Wood**'s opinion that actually do reflect "traditional agency law" and even suggest that she is advocating a negligence standard. For example, **Judge Wood** writes that "if the supervisor uses neither actual nor apparent authority to take the employment action, then the employer should be liable only if the plaintiff shows that the employer *knew or should have known* about the harassing behavior." Wood Op. at p. 171 (emphasis added).

"[t]he first question . . . should be whether the supervisor's action was *within the scope of his employment*." Wood Op. at p. 186 (emphasis added). But **Judge Wood**'s definition of "within the scope of employment" is so broad and all-inclusive that in effect it imposes "automatic" or strict liability, contrary to the *Meritor* decision. **Judge Wood** argues that liability must be strict if a supervisor harasses another employee "*as* he exercise[s]" the actual or apparent authority delegated to him. The relevant conduct, according to **Judge Wood**, is "not the act of harassment," but instead the "broader course of action," i.e., the supervisor's performance of authorized duties. Wood Op. at 188. *I disagree*. If we were to adopt this reasoning, the legal phrase "within the scope of employment" would in effect become meaningless, for it would encompass a panoramic range of conduct, whether authorized or not. Without defined parameters, the phrase "within the scope of employment" no longer serves to *limit* the reach of *respondeat superior* liability and becomes a kind of legal pit of quicksand, drawing in all manner of activity. Applying **Judge Wood**'s attenuated logic, a company could be held liable if its agent committed any kind of *unauthorized* conduct imaginable, short of rape,[13] so long as the conduct somehow occurred "as [the supervisor] exercised" some kind of *authorized* job duty. For example, a television station could be held liable if one of its news reporters "lost his cool" and physically assaulted a person while recording an interview. Such an act would give rise to liability under **Judge Wood**'s theory because it

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[13] In a supposed qualifying statement that is of no value, **Judge Wood** acknowledges that "severe forms" of sexual harassment, such as violent rape, "may be so far from the norm that the employer should not be held liable in the absence of negligence." Wood Op. at p. 189 (referring to *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir.1995)).

occurred "as" the reporter was reporting on news (authorized activity), but *respondeat superior* liability should not be imposed on these facts because the conduct in question clearly falls outside the scope of the reporter's legitimate duties and is not motivated by a purpose to serve the employer. **Judge Wood**'s analysis converts § 219's theory of *respondeat superior* (or "the master answers") into a far more all-inclusive and unbending theory of strict liability or "guilt by association."

The concepts advisedly set forth in § 219(1) of the Restatement are not so elastic. An employee's conduct (i.e., sexual harassment) "is *not* within the scope of employment if it is different in kind from that authorized . . . or too little actuated by a purpose to serve the [employer]." *Restatement (2d) Agency* § 228(2) (emphasis added); *see also Denliger v. Brennan*, 87 F.3d 214, 216 (7th Cir.1996) ("intentional torts outside the scope of employment usually do not lead to an employer's vicarious liability"); *Joel v. Morrison*, 6 C. & P. 501, 172 Eng. Rep. 1338 (1834) (servant's conduct may not be imputed to the master when servant is "on a frolic of his own."). As Judge Bork observed when dissenting from the D.C. Circuit's decision in *Meritor*, "[i]ntentional torts involving sexual escapades almost never result in employer liability because they are *personally motivated*." *Vinson v. Taylor*, 760 F.2d 1330, 1332 n. 6 (Bork, J., dissenting) (emphasis added). Thus, a rule making employers liable for such escapades is "at odds with traditional practice." *Id.* **Judge Wood** asserts that the language in *Restatement* § 228, quoted above, "imposes a meaningful limitation on the scope of employment, thereby ensuring that employers will not be held liable for the 'frolics and detours' of their employees or for acts that are unforeseeable to the employer." Wood Op. at p. 187. Yet for **Judge Wood**, it appears to be a given that unlawful *quid pro quo* harassment "will almost always fall

within the scope of [a] supervisor's employment and thus result in employer liability" because it occurs so often "as" (or while) the supervisor is performing authorized duties. Wood Op. at pp. 169, 188.

Judge Wood's boundless definition of "scope of employment" contrasts sharply with the traditional understanding of that term. As set forth in a leading treatise on tort law, "scope of employment":

> refers to those acts which are *so closely connected* with what the servant is employed to do, and so *fairly and reasonably incidental to it*, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed.1984). While the general rule of *respondeat superior* embodied in § 219 holds that an employer may be liable for the tortious conduct of employees acting within the scope of their employment, it is crucial to note that:

> not every act which an agent or servant may do *while* he is in the place appointed for the service, or *during* the time in which he is engaged in the performance, can be deemed to be *within the course of employment*, or *within the scope of the authority*. The test lies deeper than that; it inheres in the relationship which the act done bears to the employment. *The act cannot be deemed to be within the course of employment unless, upon looking at it, it can fairly be said to be a natural, not disconnected and not extraordinary, part or incident of the service contemplated.*

Hibma v. Odegaard, 769 F.2d 1147, 1168 (7th Cir.1985) (Coffey, J., dissenting) (quoting *Cameron v. City of Milwaukee*, 102 Wis.2d 448, 456, 307 N.W.2d 164 (1981)).

The *Restatement* makes clear that "not all physical acts of the kind authorized performed within the time and at the place of service are within the scope of employment, since only those which the servant does in some part for the purpose of giving service to the master are included." Restatement (Second) of Agency § 228, cmt. (a). If an employee has " 'stepped aside from the business of his principal to accomplish an independent purpose of his own,' " far removed from the scope and nature of his duties and responsibilities, the employer may not be held liable under the doctrine of *respondeat superior*. *Hibma*, 769 F.2d at 1168 (quoting *Linden v. City Car Co.*, 239 Wis. 236, 239, 300 N.W. 925 (1941)).

In addition to broadening the meaning of "scope of employment," **Judge Wood**'s analysis of *respondeat superior* liability for sexual harassment by supervisors fails to adequately address the definition of "supervisor." **Judge Wood** describes a supervisor as one who "exercise[s] the authority (actual or apparent) the employer conferred on him: hiring, firing, assigning work, disciplining others for harassing behavior, and the like." This "definition" of supervisor raises a number of questions: Is an employee who exercises any *one* of the duties listed by **Judge Wood** a "supervisor" for purposes of imposing strict liability? May an employee be deemed a supervisor even if the authority delegated to him (over firing, for example) is shared with others? And what activities fall within **Judge Wood**'s catch-all phrase "and the like," which follows her list of supervisory duties? If we are to lock ourselves into a strict liability standard for supervisory cases, as **Judge Wood** proposes, it is imperative that we define "supervisor" most precisely.

Our cases interpreting the statutory definition of "supervisor" in the National Labor Relations Act, 29 U.S.C. § 152(11) ("NLRA") have examined the meaning of this term

in some detail and recognized that "*[s]upervision in the elementary sense of directing another's work*" does not suffice to make an employee a "supervisor." *N.L.R.B. v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir.1983). Rather, a supervisor "must have *authority over another's job tenure and other conditions of employment.*" *Id.*; *see also N.L.R.B. v. Winnebago Television Corp.*, 75 F.3d 1208, 1213 ("The test of a supervisor under § 152(11) is *whether his judgment was dispositive in personnel decisions.*"). The need to define "supervisor" with precision—and to provide some meaningful, common-sense limitations on who may be deemed a "supervisor"— is even more imperative in cases of sexual harassment because Title VII, unlike the NLRA,[14] fails to provide a statutory definition of this term. It would be helpful if Congress filled in this definitional gap in the law, particularly because judicial opinions expanding employer liability have relied so heavily on the distinctions between harassment by supervisors and harassment that occurs among co-workers. In the absence of a statutory or judicial definition setting forth parameters for the term "supervisor," sexual harassment plaintiffs will obviously have an incentive to characterize all alleged harassers as "supervisors," even in

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[14] The NLRA expressly distinguishes "supervisors" from other employees, providing, in relevant part, that:

> The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

cases where the wrongdoer lacked significant authority over the plaintiff's hiring, firing, or conditions of employment.

In defining "supervisor" and addressing what conduct does (and does not) fall "within the scope of employment," we should recognize and understand that most employees, including those labeled as "supervisors," are subordinate to a number of other, higher levels of management, and lack the authority to make personnel decisions regarding whom to hire, fire, or promote. Even an employee who is just above the bottom of the employment "chain of command" may have the singular authority to "assign[ ] work" to other employees, which according to **Judge Wood** is one of the duties that transforms an employee into a "supervisor" for purposes of Title VII liability. For example, a "sanitation engineer" employed by a garbage and trash collection company may be charged with overseeing a crew of two or three workers assigned to the same truck, and authorized to "assign work" (i.e., decide on a given day who will empty trash bins and who will operate the truck). However, just because the employee has been authorized to perform such minimal duties, or just because his job description, for payroll purposes, classifies him as a "supervisor," does not mean that he qualifies as a decision-maker in the corporate enterprise, much less does he fall within the upper echelon of responsibility at the firm.

A supervisor should only be considered as an agent of the firm when he is truly vested with more than a mere modicum of authority to act for and on behalf of his principal and when he is acting *to advance the principal's interests*, as when an individual with authority to hire and fire, promote and demote another employee actually exercises that authority, and believes that his actions are in the best interests of the firm. **Judge Wood** in my view is grasping at a very thin reed of "agency law" if she wishes to hold an organization strictly

liable for an employee's intentional torts merely because that employee occupied some limited type of supervisory role within the firm, perhaps very far down in the company's hierarchy. For example, an individual classified as a supervisor of the housekeeping services detail within a corporation acts "within the scope of his employment" when he gives directions to his cleaning staff about what cleaning compound to use when tidying up the premises, or which brand of brush or vacuum to use, or when he directs that they sweep the floors at 7:30 PM rather than 8:30 PM. Would **Judge Wood** hold a newspaper *strictly liable* if an assistant city editor, in a fit of anger, physically assaults or even goes so far as to shoot and kill one of the reporters whose work he supervises? Should a correctional facility be held *strictly liable* if it allows a prisoner extra compensation for directing the activities of a clean-up crew and the supervisor/prisoner sexually assaults one of the inmates under his supervision? All of these intentional and unauthorized acts by "supervisors" represent a departure from the employee's legitimate supervisory role and therefore should not be imputed to the principal under the theory of *respondeat superior*. Yet under **Judge Diane Wood**'s all-expansive interpretation of § 219(1) and her imprecise definition of the term "supervisor," liability could be imposed in each of these hypothetical situations, so long as the "supervisor's" misconduct occurred during the course of performing authorized duties.

Turning to the facts of the cases under consideration, the alleged conduct of Jansen's harasser (Antoni) and Ellerth's (Slowik) fell outside the scope of their employment. As the Tenth Circuit observed in *Hicks v. Gates Rubber Co.*, "sexual harassment simply is not within the job description of *any* supervisor or any other worker in *any* reputable business." 833 F.2d 1406, 1418 (10th Cir.1987) (quotation omitted).

Although **Judge Wood** seemingly acknowledges the limitations on *respondeat superior* liability by stating that the supervisor must "act[ ] at least in part with the purpose of serving the employer" in order for the employer to be liable, there is not a scintilla of evidence in either of the respective court records under review that the conduct of either Antoni or Slowik was motivated by a purpose to serve their employer. Like all of my colleagues on this court, I am unalterably opposed to true sexual harassment, which is vulgar, repulsive and uncalled for under any circumstances. However, I think it is obvious that those who engage in sexual harassment are driven by *personal* motives alone that have nothing to do with furthering the aims and goals of their employers. As **Chief Judge Posner**, writing for this court, noted in a race discrimination case:

> [H]arassment is an intentional wrong, and the doctrine of *respondeat superior* makes an employer liable only for those intentional wrongs of his employees that are committed in furtherance of the employment; the tortfeasing employee must think (however misguidedly) that he is doing the employer's business in committing the wrong. It would be the *rare* case where . . . harassment against a co-worker could be thought by the author of the harassment to help the employer's business.

Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421 (7th Cir.1986) (emphasis added). In his scholarly review of post-*Meritor* sexual harassment law, Michael J. Phillips, a Professor of Business Law at Indiana University, has taken note of **Judge Posner**'s observations in *Hunter* concerning the *intentional* nature of harassment, and he has argued cogently that "[e]mployers should virtually *never* be liable for sexual harassment if *respondeat superior* is the agency principle of choice *because such behavior is rarely, if ever, within the scope of employment.*" *Employer Sexual*

Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson, 44 Vand. L. Rev. 1229, 1245 (1991) (emphasis added). An employee who sexually harasses another employee has not only violated the law, but in most cases (including the two before us today) he has likewise acted contrary to company policy. Because the harasser has clearly "stepped aside from the business of his principal" and acted beyond the "scope of his employment," his actions cannot be attributed to his employer under the theory of *respondeat superior* as set forth in § 219(1).

Judge Wood's opinion, with its elastic interpretation of the *respondeat superior* doctrine, represents a most dramatic expansion of employer liability. Her opinion is all the more sweeping because it goes on to suggest that we adopt a uniform mode of analyzing employer liability in *all* sexual harassment cases involving supervisors. Wood Op. at pp. 172-178. Not content to limit her version of strict liability to so-called *quid pro quo* cases, **Judge Wood** (joined by **Judges Easterbrook** and **Rovner)** would *also* extend that standard into each and every case in which a supervisor is alleged to have created a hostile work environment.[15] **Judge Wood**'s *broad, all-inclusive, boundless* net of strict liability, reaching *quid pro quo* and hostile work environment cases alike, finds

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[15] The differences between these two kinds of sexual harassment are discussed at greater length below.

no direct support in case law from any circuit,[16] much less the Supreme Court. Those circuits that have adopted a strict liability standard limit the application of that standard to *quid pro quo* cases only, as **Judge Wood** concedes. Wood Op. at p. 177; *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir.1994); *Bouton v. BMW of North America*, 29 F.3d 103, 106 (3d Cir.1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir.1993); *Kaufmann v. Allied Signal, Inc.*, 970 F.2d 178, 183 (6th Cir.1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir.1989).

Quid pro quo harassment does not fall "within the scope" of a supervisor's employment, as Judge Wood argues, because such conduct departs drastically from the supervisor's authorized duties and is not motivated by a purpose to serve the employer. Similarly, acts which create a hostile work environment (such as unwelcome sexual advances, touching, remarks which suggest an animus towards women, and the like) fall far afield from the scope of a supervisor's employment-related duties, as interpreted by the courts, and bear *no* relation to any legitimate activity that the supervisor is authorized to perform. As **Judge Wood** concedes in a footnote to her opinion, Wood Op. at p. 178, n. 4, the Eleventh Circuit recently *rejected* her view that employers may be held strictly liable under agency principles for acts by a supervisor which contribute to a hostile work environment. *Faragher v. City of Boca Raton*, 111 F.3d 1530

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[16] **Judge Wood** claims that *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.1994), "suggest[s]" that the Second Circuit has "moved toward [s]" her position. Wood Op. at p. 178. However, **Judge Wood** has not cited (nor am I aware of) a single opinion which directly supports her view that employers should be held strictly liable in *all* cases involving supervisors. In fact, this position was very recently repudiated by the Eleventh Circuit in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.1997) (en banc), as discussed below.

(11th Cir.1997) (en banc). In *Faragher*, the plaintiff, a female lifeguard employed by the City of Boca Raton, Florida, was allegedly subjected to "offensive comments, gestures, and touching" by two of her supervisors. Ms. Faragher brought suit against the city under Title VII, arguing that the municipality as employer should be held vicariously liable for the hostile work environment created by the two supervisors. In rejecting Faragher's claim, the Eleventh Circuit properly applied the principles of agency, noting that when an "agent steps outside of his employment to do some act for himself which is not connected to his employer's business," then "the act is not within the scope of his employment." *Id.* at 1536. In other words, "if the agent acts from *purely personal motives* [i.e., sexual harassment], *he is usually considered to have departed from his employment and his employer is not liable*." *Id.* at 1537. The Court concluded that the harassers' offensive language, gestures and touching provided an "archetypical example of employees stepping outside of the scope of their employment and seeking to further personal ends." *Id.* In line with its proper understanding of agency law, the Eleventh Circuit, in an en banc decision, held that the city could not be held liable for the harassing conduct under a theory of vicarious liability. *Id.*

I am in agreement with the Eleventh Circuit that if a supervisor or any other employee "acts from *purely personal motives*," as is inevitably the case in a hostile work environment scenario, he has "*departed from his employment and his employer is not liable*" under the principle of *respondeat superior*. *Id.* A majority of this Court agrees that strict liability is *not* warranted in hostile work environment cases, Per Curiam at p. 7, and the dearth of supporting case law for a "blanket rule" (extending strict liability to *all* cases involving supervisors) should certainly give pause to **Judges**

Wood, **Easterbrook**, and **Rovner**, who are in a distinct minority on this issue.

3. *Judge Flaum's Approach to Employer Liability*

Like **Judge Wood**, **Judge Flaum** believes that "[a]gency law [and specifically § 219] supports the imposition of vicarious liability upon employers for supervisory *quid pro quo* harassment." Flaum Op. at p. 10. **Judge Flaum** reasons that when a supervisor uses the authority delegated to him to effectuate a *quid pro quo*, " 'the supervisor, by definition, acts as the company.' " Flaum Op. at p. 12 (quoting *Steele*, 867 F.2d at 1316). Under this approach, the morally culpable harasser and the employer are treated as if they had somehow "merg[ed] into a single entity,"[17] *in spite of the fact that the employer lacked any knowledge of the harassment and took reasonable measures to prevent such conduct in the workplace*. To my way of thinking, **Judge Flaum**'s equating of employer and harasser is just a different colored facade on the same legal structure erected by **Judge Wood**, i.e., the theory that a "supervisor" (loosely defined) acts within the "scope of employment" (broadly defined) when he engages in *quid pro quo* harassment. Despite their differences, **Judge Flaum** and **Judge Wood** agree that an employer may be held strictly liable for quid pro quo harassment by a supervisor. I disagree with that proposition as a matter of both law and logic.

Although Judge Flaum advocates a strict liability standard for supervisory, *quid pro quo* cases, he states that the standard in hostile work environment cases should "remain at

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[17] The EEOC as *amicus* in *Ellerth* argued before the *en banc* panel that the issue of whether the employer has notice of the harassment "doesn't matter" because the theory underlying strict liability is that the supervisor and the employer have *somehow* "merge[d] into a single entity."

negligence." Flaum Op. at p. 24. Thus, **Judge Flaum**'s approach is not quite as drastic as **Judge Wood**'s, in that it does not propose strict liability for hostile work environment cases. Nevertheless, **Judge Flaum** asserts that employers have a "heightened duty of care" when it comes to preventing hostile work environment harassment by supervisors. Flaum Op. at p. 25. He does not define the meaning of this "heightened duty of care" standard, although he states that the "remedial goals" of Title VII require an employer to take "systemic and proactive" steps to prevent harassment by supervisors. Flaum Op. at p. 15. **Judge Flaum** also states (and I agree with his statement) that companies should "foster a culture in which harassment is not tolerated," Flaum Op. at p. 17, but this general statement fails to define or delineate his proposed standard, much less outline what employers must do *in addition* to the already widespread (and advisable) practice of adopting and publishing an anti-harassment policy and procedures for reporting harassment. If **Judge Flaum**'s "heightened duty of care" standard were adopted, appellate courts across the country would soon find themselves in a quagmire, plagued by litigants who would (understandably) ask them to define and elaborate upon a standard that comports with neither traditional negligence nor strict liability. I am unable to join **Judge Flaum**'s proposed modification of the traditional negligence standard for hostile work environment cases, and I am pleased to note that the court's *per curiam* opinion avoids the ambiguities of his "heightened duty of care" standard. I join with the *per curiam* opinion's straightforward holding that "the standard for employer liability in cases of hostile work environment sexual harassment by a supervisor is *negligence, not strict liability*. . . ." Per Curiam Op. at p. 7 (emphasis added).

4. *Judge Cudahy's Approach to Employer Liability*

Unfortunately, I do not find **Judge Cudahy**'s reflections upon **Judge Flaum**'s "heightened duty of care" standard particularly helpful; indeed, his analysis raises more questions than it answers. I will not address **Judge Cudahy**'s suggestion that employers in supervisory hostile work environment cases should be held to the same standard as "packers of parachutes or open heart surgeons," Cudahy Op. at p. 30, for in my view neither heart surgery nor parachute-manufacturing are even remotely analogous to sexual harassment.

Judge Cudahy apparently believes that "vulnerable females" will not "feel free to report [sexual harassment] to the company," even in those firms and business enterprises that have a policy against sexual harassment and established procedures for reporting the same. Cudahy Op. at pp. 29-30. In fact, **Judge Cudahy** goes farther and asserts, for reasons unexplained, that we ought to *presume* that female victims of harassment "could not reasonably be expected to report their problems" using such grievance procedures. I disagree with his contention that female victims of harassment are always "vulnerable," nor should we assume that women (who have properly and successfully campaigned to be treated as equals in the workplace) are any less capable than men of sharing in the task of both monitoring and reporting sexual harassment. Furthermore, I am concerned that what **Judge Cudahy** may really be saying is that the existence of a sexual harassment policy (and reporting procedures) should have *no* bearing on employer liability in supervisory cases. An employer faced with such judicial commentary on the irrelevance of sexual harassment policies could well ask: Why establish, much less publish, a policy?

Another problem with **Judge Cudahy**'s opinion is his assertion that whenever a sufficiently hostile or abusive environment exists (i.e., whenever the harassment is severe or pervasive enough to be actionable), there should be a legal *presumption* that the employer had "constructive notice" (i.e., "should have known") of the harassment. Cudahy Op. at p. 31. Here I note that **Judge Cudahy** is improperly relying upon the reasoning set forth in the district court's opinion in *Faragher*, 864 F.Supp. 1552, 1563 (S.D.Fl.1994), which the Eleventh Circuit on appeal specifically and emphatically rejected in its *en banc* opinion. The Eleventh Circuit noted that:

> [W]e do not agree with the district court's apparent belief that simply because conduct is pervasive enough to create an abusive work environment the employer should be charged with knowledge of the conduct. *The question of notice to the employer is distinct from the question of the environment's abusiveness. Thus, the district court erred to the extent that it conflated the two inquiries.*

Faragher, 111 F.3d at 1538. As recognized by the en banc court in Faragher, the traditional negligence standard (as opposed to the "heightened" version advocated by **Judges Flaum** and **Cudahy**) does in fact presently provide that an employer may be held liable if it knew or *should have known* about harassment in its workplace. In order that we might keep the two inquiries separate and thus avoid confusion, I agree with the Eleventh Circuit that the question of whether a specific employer under a particular set of circumstances "should have known" of harassment must remain separate

and distinct from that of whether the harassment is of such a nature as to be actionable.[18]

5. *The Need to Distinguish Quid Pro Quo and Hostile Work Environment Harassment*

I wish to note a final and very crucial area of disagreement with **Judge Flaum**'s opinion as it relates to strict liability. As previously noted, **Judge Flaum** regards a *quid pro quo* as an essential prerequisite to imposing strict liability, and observes that "defining an actionable *quid pro quo* . . . is central to the liability standard." Flaum Op. at p. 17. However, *neither* of the cases before us, from a factual point of view, involved a true *quid pro quo* as previously defined in our case law.[19] **Judge Flaum** has expanded the definition of *quid pro quo* harassment, possibly even beyond the bounds of reasonableness, in order to make the facts of *Jansen* come within the purview of a *quid pro quo* theory. **Judge Wood**, similarly, adopts an elastic approach to the definition of *quid pro quo* harassment, but this tactic is less crucial to her overall argument because in her view strict liability is the proper standard in any and all supervisory cases.

Quid pro quo harassment, as **Judge Diane Wood** noted in the very recent case of *Bryson v. Chicago State University*, "occurs in situations where submission to sexual demands is made a condition of *tangible* employment benefits." 96 F.3d

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[18] An employer can know about "harassment" that is not actionable as a matter of law. Conversely, harassment more frequently than not takes place without the employer's knowledge. Thus, as a matter of logic, it makes sense to keep these two inquiries separate.

[19] As noted in Section III of this opinion, I am confident that both Jansen and Ellerth have waived their claims of *quid pro quo* harassment by failing to raise them in their respective EEOC claims or district court complaints.

912, 915 (7th Cir.1996) (emphasis added). Harassment of the *quid pro quo* variety has been described as "the most oppressive and invidious type of workplace sexual harassment" because:

> There can be no justification for requiring a worker to engage in sexual acts in order to obtain a job or job-related benefit, or to avoid a job-related detriment. Most workers subjected to sexual pressure in the workplace have little means of defense—other than the law. For economic reasons, most workers cannot simply abandon their employment—new jobs are hard to find.

Nichols, 42 F.3d at 510. The term *quid pro quo* literally means "something for something." Specifically, as **Judge Rovner** observed in *Dey v. Colt Const. & Development Co.*, *quid pro quo* harassment involves an exchange that "link[s] an *economic* benefit to . . . participation in conduct of a sexual nature." 28 F.3d 1446, 1453 (7th Cir.1994). In order to succeed under a *quid pro quo* theory, according to **Judge Wood**'s opinion in *Bryson*, the plaintiff must demonstrate "what the '*quo*' part of the *quid pro quo* was: [i.e.,] what *tangible* aspect of employment was affected." Bryson, 96 F.3d at 916 (emphasis added).[20] In other words, a plaintiff must establish that she "has suffered a *materially adverse* employment action" for refusing to engage in unwelcome sexual conduct with the harasser. *Id.* (emphasis added).

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[20] In *Bryson*, we confined our analysis to the question of whether the plaintiff had come forward with sufficient evidence of the loss of a "tangible employment benefit" to survive summary judgment on her *quid pro quo* claim (we held that she did). The *Bryson* court noted that in other circuits, an employer may be held liable for *quid pro quo* harassment under a *respondeat superior* theory, if the plaintiff can "link the employer to the actions of the harasser." 96 F.3d at 915. However, we have not to date elaborated upon the scope of *respondeat superior* in Title VII sexual harassment cases involving an alleged *quid pro quo*.

"Materially adverse employment action" can take many forms, but (as "materially" implies) such action must in some manner affect a tangible, economic aspect of the plaintiff's job. To give but one example, this court did not hesitate to find a "*materially adverse employment action*" in the recent *Bryson* case, where the plaintiff, a university professor, alleged that she suffered the loss of her academic title as well as her assignments to various administrative committees within the university after she refused to engage in sexual relations with a university official. *Bryson*, *supra*. We reasoned that both the title and the committee work contributed to the plaintiff's stature within the university administration and were "*tangible employment benefits*" because they "*conferred prestige and [were] important to further professional advancement*." We observed that "[u]niversities have few 'carrots' to dangle in front of tenured faculty members who reach full professorhood," and that the "reward structure" within a university often includes honorary or in-house titles and committee assignments, which can serve as the "building blocks" for a promotion within the university or the attainment of a more substantial position at another academic institution. *Id.*

While "materially adverse employment action" is a broad term, it is not without parameters and limitations established in case law. Specifically, "*a supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors does not constitute* quid pro quo *harassment*." *Gary v. Long*, 59 F.3d 1391, 1396 (D.C.Cir.1995) (emphasis added). "*[I]t takes more than saber rattling alone* to impose *quid pro quo* liability on an employer; the supervisor must have *wielded the authority entrusted to him* to subject the victim to *adverse job consequences* as a result of her failure to submit to unwelcome sexual advances." *Id.* (emphasis added).

Hostile work environment harassment, by contrast with the *quid pro quo* variety, occurs "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' " *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (quoting *Meritor*, 477 U.S. at 65, 67). Although some of my fellow judges have proposed a dramatic expansion of employer liability under Title VII and have adopted a very elastic approach to *quid pro quo* harassment, I do not understand any of them to argue that we should abandon this circuit's definition of what constitutes actionable hostile work environment harassment. Our decisions have emphasized that "isolated and/or trivial remarks of a sexual nature do not satisfy the definition of sexual harassment," *Rennie v. Dalton*, 3 F.3d 1100, 1107 (7th Cir.1993), *cert. denied*, 510 U.S. 1111, 114 S.Ct. 1054, 127 L.Ed.2d 375 (1994), and that conduct is *not* actionable as sexual harassment if it is "too tepid or intermittent or equivocal to make a *reasonable* person believe that she has been discriminated against on the basis of sex." *Galloway v. General Motors*, 78 F.3d 1164, 1168 (7th Cir.1996) (holding that "safe harbor" exists for "low- level harassment."); *see also Gleason v. Mesirow*, No. 96-1458, slip op. at 21 (7th Cir. June 25, 1997); 1997 WL 365366. Hostile work environment harassment, like *quid pro quo* harassment, is a form of sex discrimination prohibited by Title VII, and obviously is not condoned under our present case law. But the two types of harassment are separate and distinct forms of discrimination and must not be co-mingled if we are to analyze and enforce sexual harassment law with coherence and clarity. In a hostile work environment case, unlike a *quid pro quo* case, the injury to the victim need not be directly linked to a tangible job benefit or detriment. *See*,

e.g., *Baskerville*, 50 F.3d at 430 ("[t]he concept of [hostile work environment] sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women.").

Jansen claims that Antoni engaged in *quid pro quo* harassment when, in response to her inquiries about the late filing of her work performance review, he stated "It's on my desk" while he performed a lewd gesture. Under the factual scenario presented in *Jansen*, I cannot agree with **Judge Flaum** that Antoni's alleged conduct is actionable as *quid pro quo* harassment. Flaum Op. at pp. 19, 26. The record reflects that Jansen was the secretary in the defendant company's tooling services department, and she worked primarily for Antoni, the manager of the department. Antoni exercised a measure of control over Jansen's working environment and was expected, as part of his duties, to contribute to the evaluation of the plaintiff's job performance. However, in his role as manager of the tooling services department, Antoni was not entrusted with the unilateral authority to hire or fire Jansen, nor was he the sole individual responsible for reviewing Jansen's performance.[21] *Contrast Highlander v. KFC Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir.1986) (would only impose strict liability for *quid pro quo* harassment if supervisory employee had "*plenary* authority over hiring, advancement, dismissal, and discipline" of the plaintiff). Since Antoni did not have final authority over personnel matters affecting the plaintiff, there is at least a legitimate question as to whether he was even in a position to engage in *quid pro quo* harassment of Jansen. In other words, I seriously question whether he ought to be classified as a "supervisor," and note again that we lack a clear

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[21] Her performance reviews required the approval of Henry Weil, the Director of Operations at the PCA facility.

definition of this crucial term to guide us in cases of *quid pro quo* sexual harassment.

Moreover, even assuming that Antoni *could have* subjected the plaintiff to *quid pro quo* harassment, the record is clear that he did not *actually* do so. *Antoni never followed up his comment and/or gesture to the plaintiff with adverse job action*, nor did Jansen ever comply with Antoni's alleged unwelcome sexual advances. As the district court made clear in granting summary judgment in favor of PCA on the *quid pro quo* claim, Jansen *did* receive her performance review and was given a satisfactory rating as well as a raise in salary. Jansen argues (and **Judge Wood** agrees) that the three-month delay in receiving her review/raise was itself an adverse job consequence, Wood Op. at pp. 199- 200, but a short delay in receiving a review/raise represents such a *de minimis* economic loss that it cannot reasonably or properly be interpreted as a "materially adverse employment action."[22] Moreover, Jansen has failed to demonstrate a causal connection between her refusal to acquiesce in Antoni's alleged advances and the delay in her performance review. As Jansen well knew, *it certainly was not an unusual occurrence for PCA to fail to conduct personnel performance reviews in a timely fashion.* In fact, delayed reviews were so common that the company had in place a policy of making pay raises retroactive to the date when the review was due to be filed. Jansen's salary raise, although tardy, was made retroactive, in full accordance with this policy.

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[22] Creatively, **Judge Wood** asserts that the plaintiff suffered a tangible economic loss because she was deprived of the *interest* she would have earned on a timely raise, Wood Op. at pp. 199-200, but I am not persuaded that the interest on a very modest amount of money, for a relatively short period of time, rises to the level of a tangible, job- related detriment.

Jansen admitted, in her deposition testimony, that she neither acquiesced in Antoni's alleged demands *nor suffered any tangible, adverse job consequences* because of her failure to do so. Although **Judges Wood and Flaum** now would both hold that a mere threat of *quid pro quo* action is actionable as *quid pro quo* harassment, they have failed to cite any case law (nor am I aware of any) that would allow Jansen to proceed under a *quid pro quo* theory on the basis of *unfulfilled* threats (or perceived threats) and nothing more. *See Gary*, 59 F.3d at 1396 ("[I]t takes more than saber rattling alone to impose *quid pro quo* liability upon an employer."). One student of employment discrimination law has recently and properly summarized the law in this area, explaining that a *quid pro quo* claim:

> requires that the victim either actually refuse the advances and suffer tangible job detriment or submit and retain a tangible job benefit. Quid pro quo theory appears not to encompass cases in which the supervisor threatens a job detriment but fails to carry through on his threat after the victim refuses to submit. *There is thus no doctrine of attempted quid pro quo harassment*; such unwelcome advances could only be challenged under the hostile work environment theory.

J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 Va. L. Rev. 273, 280 n. 15 (1995) (emphasis added).

Judge Flaum essentially maintains that there is a doctrine of "attempted *quid pro quo* harassment," and argues that his position "has a toehold in the case law." Flaum Op. at p. 18. He quotes language from three circuit court opinions for the proposition that a supervisor's unfulfilled *quid pro quo* threat may be deemed *quid pro quo* harassment: *Nichols v. Frank*, 42 F.3d 503 (9th Cir.1994); *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir.1994); and *Sparks v. Pilot Freight Carriers*,

Inc., 830 F.2d 1554 (11th Cir.1987). All three of these cases involved facts far more egregious than those set forth in *Jansen*. The plaintiffs in *Nichols* and *Karibian*, unlike Jansen, alleged that they *actually acquiesced* in their supervisors' demands for sexual favors in order that they might obtain or keep some kind of *job-related benefit* (in *Nichols* it was permission to take a leave of absence, in *Karibian*, the plaintiff maintained that her *"raises, hours, autonomy and flexibility" were conditioned on her willingness to sleep with her supervisor*). *Sparks* is also distinguishable from *Jansen*, for in *Sparks* the plaintiff alleged that she was *discharged* (*a clear job-related detriment*) "*in retaliation for her refusal to accede to [her supervisor's] sexual demands.*" *Id.* at 1557.

I also find problematic **Judge Flaum**'s assertion that Antoni's unfulfilled threat is actionable as *quid pro quo* harassment merely because it resulted (or allegedly resulted) in "real emotional strife" or "anxiety and distress" for the plaintiff.[23] Flaum Op. at p. 19. Nor do I agree with **Judge**

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[23] Jansen claims that she "suffer[ed] from depression and other physical and mental ailments" on account of Antoni's harassment. If Jansen prevails on her negligence claim on remand, the jury will have an opportunity to assess the credibility of her expert witnesses (if any) concerning her mental state, keeping in mind "the marked propensity of those who purport to have psychiatric expertise to tailor their testimony to the particular client whom they represent." *Steele v. State*, 97 Wis.2d 72, 97, 294 N.W.2d 2 (1980). I agree with **Judge Posner** that there is "a serious question of whether [Jansen] can obtain substantial damages" if she succeeds in attempting to establish a hostile work environment claim on remand, because she waited for some fifteen months before reporting Antoni to PCA's Human Resources Department, all the time keeping a detailed log of her alleged harasser's activities. Posner Op. at pp. 54-55. Under the doctrine of avoidable consequences, "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort." *Black's Law Dictionary* 136 (6th ed.1991).

Diane Wood's speculation that because a plaintiff may experience *both* types of sex discrimination at the same time, the distinctions between *quid pro quo* and hostile work environment harassment (by now well-recognized in Title VII law) are somehow meaningless. Wood Op. at p. 172. Statements of this kind only serve to further cloud the law of sexual harassment by casting a haze over the well-recognized boundaries between *quid pro quo* harassment and hostile work environment harassment. Like the experienced trial judge in *Jansen*, 895 F.Supp. at 1066, we should follow the established and well-recognized definition of *quid pro quo* harassment in disposing of Jansen's claim, instead of merely assuming that there was a *quid pro quo*, or worse, twisting the definition of *quid pro quo* harassment to fit the facts of this particular case.

I also wish to emphasize that however objectionable, Antoni's remark and gesture, *by themselves*, do not rise to the level of actionable hostile work environment harassment as defined in our case law, for they did not "cross [ ] the line that separates vulgarity (not actionable) from harassment (potentially actionable)." *Baskerville*, 50 F.3d at 431. As this court has observed, "the concept of sexual harassment . . . is not designed to purge the workplace of vulgarity." *Id.* at 430. Unfortunately, we do not live in the most cultured, virtuous or well-mannered time in world history, so that even in the workplace a certain amount of "vulgar banter, tinged with sexual innuendo," is inevitable today, particularly if one has the misfortune to work with "coarse or boorish" individuals who lack "refinement." *Id.*

In addition to arguing that a *quid pro quo* existed in *Jansen*, **Judges Flaum** and **Wood** claim that *Ellerth* also involved *quid pro quo* harassment. However, I agree with **Chief Judge Posner** that "*Ellerth*, like *Jansen*, is purely a hostile work environment case" and therefore must be analyzed

under the negligence standard. Posner Op. at p. 55. The facts of *Ellerth* do not support the strained conclusion of my respected fellow **Judges Flaum** and **Wood** that *quid pro quo* harassment took place. Ellerth's contact with Slowik (who was based in New York, more than 500 miles away) included telephone conversations with her superior approximately once a week. During two conversations in early May 1994, the following exchanges allegedly took place (as summarized by the district judge):

> [W]hen Ellerth was talking to Slowik to get special permission to do something for a customer, Slowik said something along the lines of "I don't have time for you right now, Kim, unless you're telling me—unless you want to tell me what you are wearing." Ellerth said she had to go and hung up. On a follow-up call, again to get permission, Slowik told Ellerth that she did not have permission for the project and he then said something along the lines of "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."

Ellerth v. Burlington Industries, Inc., 912 F.Supp. 1101, 1108 (N.D.Ill.1996).

Judge Wood, making the case for the existence of a *quid pro quo*, argues that "Slowik . . . refused to give [Ellerth] special permission for work projects until she described her physical appearance to him." Wood Op. at p. 200. Referring to Slowik's question about whether Ellerth was attired in a long or a short skirt, **Judge Wood** seemingly embellishes the facts by asserting that Slowik forced Ellerth *"to play the role of sex object* in order to obtain *desirable* work assignments." Wood Op. at p. 201 (emphasis added). Once again, the definition of *quid pro quo* harassment is being stretched to fit the facts of a particular case. While asking a female

employee to describe what she is wearing may be uncalled for and perhaps, if combined with other more egregious conduct, may give rise to a hostile work environment, such a comment is a far cry from asking a female employee to engage in sexual activity in order that she might keep her job or obtain a desired promotion. More importantly, Ellerth never did suffer an "adverse employment action" as a consequence of refusing to "play the role of sex object" (as **Judge Wood** refers to it). She was neither fired, denied a promotion, [24] suffered a reduction in pay, nor did she lose a job title crucial to her advancement, much less was she transferred to another department with diminished responsibilities or fewer opportunities for promotion. *Bryson*, 96 F.3d at 916. Furthermore, **Judge Wood** has failed to persuade me that when Slowik denied Ellerth "special permission to do something for a customer," he was making "*desirable* work assignments" (i.e., assignments that would allow Ellerth to advance at Burlington) contingent upon willingness to go along with his sexual banter. I believe that **Judge Flaum**'s and **Judge Wood**'s journey in pursuit of a *quid pro quo* (on these facts) resembles a search for a diamond in a wagonload of hay. While they claim to have discovered the diamond (i.e., a *quid pro quo*), I have combed the record and can find nothing but the hay.

Judge Kanne has brought to our attention an additional and most important point concerning the dangers of expanding the definition of *quid pro quo* harassment (to include mere threats). He notes, in his opinion, that *"quid pro quo* threats may be ambiguous, and if such threats make an employer strictly liable, plaintiffs will attempt to turn all instances of supervisor sexual harassment into 'implied

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[24] In fact, as **Judge Flaum** notes in his opinion, Ellerth received a promotion (in March 1994). Flaum Op. at p. 27 n. 13.

threats' in order to take advantage of strict liability's easier burden of proof." Kanne Op. at p. 32. A better approach would be to hold, consistent with our precedent, that plaintiffs such as Jansen and Ellerth may not proceed under a *quid pro quo* theory unless they can establish *that they have actually suffered a tangible, job-related loss (such as being fired or denied a promotion) for refusing to go along with the harasser's sexual demands*. *Bryson*, 96 F.3d at 916; *Gary*, 59 F.3d at 1396; *Hicks*, 833 F.2d at 1414.

Because our interpretations of congressional enactments such as Title VII are to serve as guideposts for the trial courts as well as for the legal profession as a whole (to say nothing of business and industry) it is crucial that we approach concepts such as *quid pro quo* harassment in a clear, logical fashion that adheres to precedent. The law of sexual harassment has become increasingly complex over the years, resulting in confusion and uncertainty as to what really constitutes sexual harassment in the eyes of the law. One observer has stated, without exaggeration, that "the web of sexual harassment [law] has truly become tangled in the mass of court opinions, agency guidelines, and law review articles on the subject." King, *Sex, Love Letters, and Vicious Rumors*, 9 B.Y.U. J. Pub.L. 341, 365 n. 5 (1995). The boundaries between "harassment" and normal interaction between the sexes are now so blurred that a six year-old first-grade student in Lexington, North Carolina who kissed one of his female classmates (also a mere six years of age) on the cheek, found himself suspended from school recently for engaging in "unwarranted and unwelcome touching" (i.e., "sexual harassment"). *See* Linda Chavez, *Feminist Kiss Patrol* is on the *March*, USA Today, Oct. 2, 1996, at 15A (common sense ultimately prevailed and the school lifted the suspension).

Mindful of the need to strike a balance between the rights of employers and employees, I am unable to join either **Judge Flaum** or **Wood** on their theory of what constitutes actionable *quid pro quo* harassment. By molding the facts of these cases, and attempting to make them fit within a newly-elusive *quid pro quo* theory, my colleagues are attempting to obliterate the very definition of *quid pro quo* harassment. In my view, their respective opinions have interpreted *quid pro quo* harassment in a fashion that can best be classified as elastic, so that the term *quid pro quo* would no longer have a fixed meaning, and would thus be stretched to accommodate the facts of the particular case. This approach, should it become the law of this circuit, will register a "7.5" on the Richter scale and will certainly upset the balance between the rights of employers and employees while adding to the existing uncertainty and confusion in this complex, controversial, ever-expanding, and troubling area of the law.

6. *Judge Posner's Approach to Employer Liability*

Judge Posner has outlined a more limited approach to the question of employer liability, yet he still advocates—largely on policy grounds—that we venture part way into the realm of strict liability. He would only impose *strict liability* in a limited subset of *quid pro quo* cases, i.e., those where the supervisor *successfully* "us[es] his delegated authority to do a company act" as part of a *quid pro quo*; for example, by firing an employee, or denying a promotion/raise. Posner Op. at p. 47. **Chief Judge Posner** does not allow himself to fall into the trap of asserting, as do **Judges Flaum** and **Wood**, that a mere unfulfilled threat to take any of these actions is a sufficient basis for holding the company strictly liable. Posner Op. at p. 49. In fact, **Judge Posner** and I are in agreement that neither Jansen's supervisor nor Ellerth's engaged in a true *quid pro quo*, yet curiously **Judge Posner** theorizes at length as to why strict liability may be

appropriate in some *quid pro quo cases*. **Judge Posner** apparently believes that if Jansen's supervisor *had* successfully blocked Jansen's promotion (because she refused to acquiesce in his sexual overtures), it would be proper to hold PCA strictly liable. I obviously agree with **Judge Posner**'s rationale that the employer, knowing he is subject to strict liability, will have more of an incentive to monitor "very carefully" the personnel decisions of all of its supervisory employees. However, my colleague has failed to persuade me that this monitoring "should be relatively easy to do," or that it will bring about an effective system for the review and control of supervisory actions taken in the exercise of "delegated authority." Posner Op. at p. 47.

Initially, I wish to re-iterate that I am in agreement with **Judge Posner** that the questions before us are matters of *federal* common law and *not* state law. However, I do not agree with the Chief Judge that we are free to ignore traditional common law principles and "create" our own set of agency principles, guided solely by our personal views of what is sound policy in this area. Posner Op. at p. 42. **Judge Posner** refers to the common law principles set forth in the American Law Institute's *Restatement (Second) of Agency* as "antiquated screed," and throughout his opinion he relies heavily on policy arguments rather than on precedent. While I appreciate and always respect the Chief Judge's candor about his preferred approach, with all due respect I submit that his method is inconsistent with our role as judges, and with the Supreme Court's directive in *Meritor* that we "look to agency principles" in this area (the Court even cited the *Restatement* as a source for such principles).

As noted at the outset, *strict liability* is based upon a *policy* judgment concerning the proper allocation of costs among various parties in society. This court at times is called upon to exercise a policy-making function, especially when a federal

statute is unclear or even silent as to a question of legal and social significance. As we fill the gaps in a federal statutory scheme such as Title VII, however, we should keep in mind the words of our distinguished colleague Judge Jesse Eschbach, that we are "*[w]riting . . . on the shores of Lake Michigan rather than the banks of the Potomac. . . .*" *Vail v. Board of Education*, 706 F.2d 1435, 1445 (7th Cir.1983) (Eschbach, J., concurring). In exercising our very limited and circumscribed policy-making role, we must proceed with caution, and not lose sight of the fact that we are bound by the Constitution and by legal precedent. Above all, we must respect the doctrine of separation of powers, which is "essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Under this doctrine, law*making* authority is assigned to the elected branches of Government:

> *The Constitution wisely vests [the legislative] branch of the government with the power and authority of law-making, for the legislature is better equipped to carry out that task* in that interested parties . . . are able to present their respective positions before the legislative body in a more open, unrestricted, informal forum. Thereafter, the myriad of questions and problems, as well as their possible solutions, are brought before the entire legislative branch of government and are subject to the scrutiny of public hearings and debates.

Curtis v. Thompson, 840 F.2d 1291, 1305 (7th Cir.1988).

We should also remember that there are certain *practical* limitations on our capacity to address complex social problems. As Chesterfield Smith, a distinguished former president of the American Bar Association, once observed:

> [C]ourts are being asked today to solve problems for which they are not institutionally equipped, or at least not

> as well equipped as other areas of government [such as the legislature].
>
> As far as possible, judicial forums should be reserved for doing only that which cannot be done elsewhere.
>
> The American public perceives the courts as a jack-of-all trades available to furnish the answers to whatever may trouble them. Shall a war be prosecuted or peace made? What is life, or when does death begin? Shall racial integration be achieved by . . . busing of children to far away schools? How shall prisons and mental institutions be operated? Shall nuclear power plants be built, and if so, where? Shall the Concorde fly to these shores? Is affirmative action really inverse discrimination? Shall the snail-darter survive? [Should employers be held strictly liable for acts of sexual harassment by supervisors?] . . .
>
> The courts properly should be only the conflict-resolvers and not the problem-solvers of American society.

Wangen v. Ford Motor Co., 97 Wis.2d 260, 324, 294 N.W.2d 437 (1980) (Coffey, J., dissenting) (refusing to join "judicial legislation" that would permit recovery of punitive damages in strict liability actions involving allegedly defective products). A decision issued by a panel of judges is at best a poor substitute for legislation enacted by a majority of the 100 Senators and 435 Representatives in the United States Senate and House respectively, after full hearings and debate, and signed into law by the President. The Congress, unlike this court, can act "with the benefit of citizen input . . . [and] a trained staff to search out, weigh, balance, and comprehend" the far-reaching economic consequences of policy decisions of this nature. *Id.* at 324, 294 N.W.2d 437. "It is presumptuous for this court, which does not and cannot have the benefit of public hearings and constituent expression of opinion, to commend *sua sponte* any specific change [in

legislation]," such as expanding Title VII to make employers *strictly liable*. *Id.* at 325, 294 N.W.2d 437 (quotation omitted). "If social welfare experimentation is to be conducted, it should be done by the legislature. The implications for the free enterprise system, and therefore the structure of our economy, are too disturbing to leave a decision of this magnitude to [a panel of] jurists." *Id.* at 331, 294 N.W.2d 437. As this court recognized in *Curtis v. Thompson*:

> the fact-finding and policy-making capabilities of a court of law are far more *limited and confined* [than those of the legislature] due to the very being of a court of law, enshrined with its technical rules of evidence as to admissibility and materiality that often serve to *limit a court's ability to make a clear, definitive, and thus reasoned pronouncement on matters of public policy*.

840 F.2d at 1305. In carrying out our policymaking role, therefore, it is imperative that we "exercise [our] powers of review and decision making with *discretion and reservation*, giving due deference to the other branches of government." *Id.* Until Congress or the Supreme Court addresses more definitively the issue of employer liability under Title VII, we should approach the question cautiously, and not attempt to take the law beyond both the terms of the statute and existing case law by adopting a far-reaching standard of strict liability.

Judge Posner points out, and I agree, that the costs associated with a strict liability standard will ultimately and sadly be borne *not only by the workers but also by the consumers*, Posner Op. at p. 44; *see also Excuse Factory, supra*, at 296 ("workers can be expected to shoulder the bulk of the costs of a right to sue over things that go wrong in the workplace."). Nevertheless, having pointed out these costs, **Judge Posner** fails to take them into consideration when he proposes a strict liability standard that would mandate a

highly centralized, potentially limitless, and expensive system for "supervising the supervisors." This system would require employers and CEO's to review almost any and *all* personnel and advancement related decisions with a jaundiced eye to ensure that they were not based on impermissible criteria. This kind of "monitoring" will not be "easy" in all (or even most) business settings. In fact, I am at a loss to understand how the CEO of any sizable company can be expected to monitor "very carefully" the personnel decisions of all of his company's supervisory employees, much less ascertain the subjective intentions lying behind them. I am also doubtful that supervision and training will succeed in eliminating the problem of workplace sexual harassment, whose origins are in social attitudes and beliefs that develop long before most people are old enough to draw their first paycheck.

Even if I were to agree with Judge Posner that multi-layered scrutiny of supervisory employees would prove workable in curtailing sexual harassment, this court is in no position to dictate management procedures for private businesses, nor should it impose costly legal requirements on these firms merely because we may individually be convinced that they are good policy. We judges are not "jacks of all trades," *Wangen*, 97 Wis.2d at 324, 294 N.W.2d 437, much less sufficiently trained or experienced to be classified as experts on business management. Nor, as far as I am aware, have any of us successfully completed an M.B.A. program at a recognized school of higher learning (e.g., Wharton, Kellogg, Chicago, Stanford, Harvard). We should refrain from tackling policy issues that lie beyond our province. Indeed, the Supreme Court has cautioned that "[c]ourts are generally less competent than employers to restructure business practices" and that "consequently, the judiciary should proceed with care before mandating that an employer must adopt" a particular business practice. *Wards Cove Packing*

Co. v. Atonio, 490 U.S. 642, 661, 109 S.Ct. 2115, 2127, 104 L.Ed.2d 733 (1989) (superseded in other respects by the Civil Rights Act of 1991, Pub.L. No. 102-166 § 3, 105 Stat. 1071 (1991)). When an employer delegates the making of personnel decisions to its supervisors, and when the supervisor abuses that authority by engaging in *quid pro quo* harassment, fairness dictates that the employer should be judged in terms of what it knew about the supervisor at the time it delegated authority, and whether, in light of that knowledge, the delegation of authority was *reasonable* (i.e., negligence standard). Requiring more from industry (i.e., multi-layered bureaucratic structures to "monitor" supervisory employees "very carefully") ignores the realities and complexities of the modern business world and imposes an unreasonable and unworkable burden on employers.

D. *Additional Concerns with Strict Liability*

I am forced to disagree with our Chief Judge that expanding employer liability for sexual harassment represents but a "relatively esoteric and marginal change in the law." Posner Op. at p. 50. Making the employer strictly liable for the actions of an uncouth supervisor, without regard for any safeguards the employer may have put in place to prevent or deal with the harassment, will have deep and lasting consequences. The long-term problems that will result from a strict liability standard, in my view, far outweigh the dubious alleged gains associated with such a new and far-reaching standard. First of all, a strict liability standard will affect each and every facet of personnel decision-making, including but not limited to hiring, firing, and the employee review process, possibly bringing about a fundamental re-orientation of the employer-employee relationship. It will also have the effect of "chilling" social interaction in the workplace. **Judge Posner** notes, and I agree, that "romantic encounters, including romantic encounters between

supervisors and supervised, are a fact of the workplace" and indeed, "many happy marriages have grown out of such encounters." Posner Op. at p. 50. Today, however, as a result of the "constantly shifting" rules created by "evolving court opinions," the workplace is being transformed into "a nervous nest where people are afraid to say what they think and express honest emotions." Vincent J. Schodolski, *Harassment Suits Curb Workplace Free Speech*, Chi. Trib., June 23, 1997, at 1.

The detrimental impact of a strict liability standard will, by no means, be limited to social interaction in the workplace. We should consider, as an initial matter, the ramifications of strict employer liability for the federal judicial system, of which this court is an integral part. As a respected colleague of ours on the federal bench recently observed, "the federal courts are flooded with employment cases. We are becoming personnel czars of virtually every one of this nation's public and private institutions. The drafters of [Title VII] could never have intended the resulting consequences from what they deemed to be necessary, progressive legislation." *Tschappat v. Reich*, 957 F.Supp. 297, 299 (D.D.C.) (1997) (Sporkin, J.). Not surprisingly, since Congress amended Title VII in 1991 to permit the recovery of punitive damages

(albeit only under limited circumstances),[25] the number of employment cases filed in federal court has jumped from 10,771 (1992) to 23,152 (1996). Robert J. Samuelson, *The Limits of the Law*, Newsweek, Jun. 30, 1997, at 50. We should not kid ourselves: the adoption of strict liability by judicial fiat will likewise increase the volume of Title VII litigation and strain the resources of our already over-burdened federal court system. In recent years, Congress (in addition to legislating new civil causes of action) has created a significant number of new federal crimes, without conducting judicial impact studies to determine how such legislation will affect the justice system. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135 (1995). As Chief Justice Rehnquist has observed:

> [I]n talking about the future of the federal courts, we must understand that Congress probably will continue to enact new legislation that provides new causes of action for

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[25] Although the Civil Rights Act of 1991 permits the recovery of punitive damages, as well as compensatory damages for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," I wish to emphasize that punitive damages are available under this law only if certain requirements are met, i.e., only if the "complaining party [can] demonstrate[ ] that the respondent engaged in a discriminatory practice or discriminatory practices *with malice or with reckless indifference to the federally protected rights of an aggrieved individual*." Pub.L. No. 102-166, § 102(b), 105 Stat. 1071, 1073 (1991) (codified at 42 U.S.C. § 1981a(b)(3)) (emphasis added). Furthermore, the combined sum of the punitive damages and the compensatory damages for non-pecuniary loss may not exceed $300,000 for each complaining party. *Id.* I point out these limitations because a plaintiff who predicates his or her claim solely on a theory of strict liability (i.e., a plaintiff who has not even demonstrated employer *negligence*), will obviously fail in establishing that an employer has acted with "malice or reckless indifference" to rights protected by Title VII.

> litigants on the civil side of the docket and new federal crimes to be prosecuted on the criminal side of the docket. *It is the federal district courts and the courts of appeals that are being hit hardest by this ever-increasing wave of litigation.* . . . With the district courts, it is largely a question of having enough judicial manpower to adjudicate the incoming cases. The same is true to a large extent of the courts of appeals. . . .

Keynote Address of Chief Justice William H. Rehnquist, Symposium: The Future of the Federal Courts (April 9, 1996), *reprinted* in 46 Am. U.L.Rev. 263, 265 (1996). In light of these developments, I am amazed that we would even consider expanding Title VII in a manner that will undoubtedly add to the already burdensome number of sexual harassment lawsuits that are brought before the trial courts and appealed to our own court.

The adoption of strict liability could also have significant, even worldwide, *economic* consequences, for it exposes American industry to a greater amount of Title VII litigation and thus adversely affects American business as it attempts to compete in an ever-expanding global marketplace. I join with thousands of American citizens who are of the opinion that employers today are over-regulated and saddled with an increasingly burdensome, indeed an overwhelming, amount of litigation, including Title VII litigation (much of which, as we realize, often is without merit). *See* Chrys A. Martin, *Special Considerations in Sexual Harassment Claims*, Federal Lawyer, Jul. 1996, at 35 ("Employment litigation is on the rise, particularly that involving claims of sexual harassment."). Indeed, the rising tide of employment-related litigation has prompted many firms to require—as a condition of employment—that employees agree to accept arbitration and forego their right to sue in court over employment-related

disputes. Leslie Kaufman & Anne Underwood, *Sign or Hit the Street*, *Newsweek*, June 30, 1997, at 48.[26]

The clarion call of the social engineers of our day seems to be that courts should *eradicate sexual harassment with instantaneous action and a broad brush and force employers to "pay the price" for alleged sexual misconduct* through the imposition of a strict liability standard, whether or not they were even aware of such conduct. That clarion call may, in fact, be more akin to *the first chime of the death knell for more and more American businesses, and workers on this side of the globe*. Unfortunately, we have been going down this road for some thirty years, as the ongoing project of contingency-fee lawyers has been to expand strict liability for deep-pocket defendants whenever possible. The expansion of products liability and punitive damages law has resulted in a windfall for contingency-fee lawyers who specialize in challenging deep-pocket corporate defendants, with the use of allegedly qualified "experts" who, in truth, courts have often found to be less than reliable, if not purveyors of so-called "junk science." All of this has created a tumultuous environment for American business, which is attempting to find its niche and compete in the global marketplace (thus generating American jobs) hampered by this albatross of court-created confusion over the scope of tort liability. *See, e.g.*, Walter K. Olson, *The Litigation Explosion* (1991).

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[26] The Supreme Court has suggested that this is a viable strategy. In 1991, the Court held that "[a]lthough all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (stockbroker's claim under the Age Discrimination in Employment Act can be subjected to compulsory arbitration, pursuant to written arbitration agreement).

Through ill-advised decisions and judgments, our courts, egged on by activist groups, have created an almost hostile environment for business by permitting the recovery of crippling punitive damage awards and by over- expanding doctrines such as strict liability for manufacturers of allegedly defective products. *See, e.g., Wangen*, discussed *supra*. In response to the general trend of making corporate "deep pockets" strictly liable (often for large punitive awards), many businesses have moved their operations (and many American jobs) out of the country (e.g., to Mexico) or even overseas,[27] while others have been forced to close their doors or even file for bankruptcy protection.[28] It is also well-documented that the added costs of insuring and defending against these lawsuits are passed along to the consumer. As noted recently by former United States Attorney General Richard Thornburgh, the "lawsuit tax" represents approximately $100 of the cost of a $200 football helmet, $20 of the cost of a $100 stepladder, $3,000 of the cost of a heart pacemaker, more than two-thirds of the cost of a childhood DPT vaccine, and as much as $500 of the cost associated with an average two-day maternity stay in the hospital. Richard Thornburgh, *Lawsuit Loopiness: Congress, Lawyers Square Off Over Legal Reform*, Harrisburg Patriot & Evening News, Dec. 28, 1995, at A11.

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[27] *See, e.g.*, William W. George, *Medical Technology and Competitiveness in the World Market*, 50 Food & Drug L.J. 477 (1995) (describing how medical technology firms are moving their research, development, and manufacturing operations overseas in part to avoid exposure to product liability lawsuits).

[28] In May 1995, for example, the Dow Corning Corporation filed for Chapter 11 bankruptcy protection in response to a mounting number of product liability lawsuits involving the company's silicone breast implants. Milo Geyelin & Timothy D. Schellhardt, *Dow Corning Seeks Chapter 11 Shield*, Wall St. J., May 16, 1995, at A3.

Numerous state legislatures have taken action to resolve the problems that have arisen since the establishment of punitive damages liability and its developing case law. The growing number of abusive and overzealous punitive damage awards—and the courts' reluctance to deal with the same—have prompted legislative reform efforts in states across the country. 1 Ghiardi & Kircher, *Punitive Damages: Law & Practice* § 6.36 (1997). Four states, Oregon, Georgia, Connecticut, and New Jersey, have enacted product liability statutes dealing specifically with the problem of burgeoning punitive damage awards. *Id.* at § 6.38. These four states have implemented a variety of strategies to deal with the problem, including the raising of standards for establishing liability, increasing the burdens of proof, and setting fault specific criteria to be considered in determining the size of awards. *Id.* On the other hand, the states of California, Colorado, Minnesota, Nevada, North Dakota, South Dakota, and Virginia, also in an attempt to address the issue, have enacted punitive damage statutes which likewise apply to products liability. *Id.* Many of these statutes contain elements of the Uniform Products Liability Act (UPLA), model legislation drafted by the Federal Interagency Department, while others have instituted caps on punitive awards. *Id.*[29] Still other states, either by statute or by common-law, have seen fit to

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[29] *See, e.g.*, Ill. St. 735 § 5/2-1115.05 (caps punitive damages at three times economic damages); Fl. Stat. § 768.73(1)(a) & (b) (1993) (same); Ga.Code Ann. § 51-12-5.1(e) (1995) ($250,000 cap); Va.Code Ann. § 8.01-38.1 (1993) ($350,000 cap).

prohibit or sharply limit the recovery of punitive damages altogether.[30]

Concern over the adverse impact of large punitive awards has even prompted national efforts at reform. *In 1996, for example, both houses of Congress passed the "Common Sense Product Liability Reform Act," which would, inter alia, have capped the punitive damages that a jury could award in cases involving faulty products.* H.R. 956, 104th Cong. (2d Sess.). Although this reform legislation was vigorously opposed *by the National Trial Lawyer's Association and eventually vetoed by the President, it nevertheless sent a strong message that a majority of Americans are very concerned about runaway judicial decisions in the products liability area, and the impact such decisions have on business, workers, and consumers. Wall St. J.*, May 3, 1996 at B11.[31]

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[30] These states include Louisiana (prohibited by common-law but authorized by specific statutes), Massachusetts (prohibited by common-law unless expressly authorized by statute), Washington (same); Nebraska (prohibited by common-law), and New Hampshire (prohibited by statute unless specifically authorized by statute). 1 Ghiardi & Kircher, *Punitive Damages: Law & Practice* §§ 4.06-4.11 (1997). Because the common-law of Connecticut and Michigan limits punitive damages, at least in part, to those of a "compensatory" and "exemplary" nature, respectively, "some might consider that punitive damages, in the traditional sense, are not allowed in these jurisdictions." *Id.* at § 4.06 n. 1 and §§ 4.02-4.04.

[31] With respect to punitive damages, the judicial pendulum may be swinging back towards a more cautious approach, for the United States Supreme Court recently held that the due process clause of the 14th Amendment prohibits "grossly excessive" punishment in the form of punitive damages. *See, e.g., BMW of N. America, Inc. v. Gore*, __ U.S. _ , 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (punitive damages in excess of 500 times the amount of actual damages was "grossly excessive").

Court-created liability in the area of medical malpractice (as in the products context) has served to increase dramatically both the size and frequency of malpractice awards and settlements, *which in turn has driven up the cost of malpractice insurance premiums and contributed to the undesirable practice of "defensive medicine" (i.e., performing tests and procedures that are not medically necessary in order to safeguard against liability). See* Theodore R. LeBlang, *Medical Malpractice and Physician Accountability: Trends in the Courts and Legislative Responses*, 3 Annals Health L. 105 (1994) (discussing recent judicial decisions that have broadened liability for malpractice, as well as the costs associated with expanded liability). I agree that a physician whose carelessness or mistake h and that justice requires that the victim be compensated. However, *courts as caused injury should be held accountable under the law, today are going well beyond such basic principles of traditional tort law*. To cite but one example, it is increasingly common for the courts to permit a medical malpractice plaintiff to rely upon the doctrine of *res ipsa loquitur* in proving physician negligence, which according to one critic is nothing more than a *"means of transforming the tort regime from a fault-based system to one of strict liability."* Karyn K. Ablin, *Res Ipsa Loquitur and Expert Opinion Evidence in Medical Malpractice Cases: Strange Bedfellows*, 82 Va. L.Rev. 325 (1996) (emphasis added). *Broad, judicially-created liability for malpractice, combined with the tremendous amount of paper-shuffling that is now required of doctors in order to satisfy mounting government regulations and requirements, has driven up the cost of healthcare and prompted many physicians to leave the practice*. And once again *who has suffered: the patient-consumer*. Entangled in a legal morass created largely by ill-advised court and jury decisions, *our nation's healthcare*

industry is now controlled from the insurance boardroom rather than the caregiver's office, and it is the patient who suffers under our "revolving- door" system of medical care (e.g., by being released early from the hospital as a cost-cutting measure). As with punitive damages in the products liability context, there has been a vigorous legislative response to skyrocketing malpractice awards in the form of statutory caps on non-economic damages in many states.[32]

Just as the ill-advised expansion of the law in the aforementioned areas has worked to the detriment of the average American citizen, so too will the expansion of employer liability in the Title VII context. By ignoring the Supreme Court's decision in Meritor and embarking on an ambitious judicial project to expand employer liability, we add to the already-onerous legal and regulatory burdens on American business, and send a message to employers on this side of the water that they are now considered as second-class citizens, whose "guilt" with respect to sexual harassment may henceforth be presumed, without even so much as a showing of knowledge much less fault. If history is any guide, many American businesses will respond to these developments by boosting prices for goods and services, or by transferring and re-locating their manufacturing operations across the waters, perhaps to countries in Asia or Central America where regulatory restrictions and the level of litigation generally are

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[32] Many states, including Wisconsin, have enacted statutory caps on the amount a plaintiff can recover for "non-economic" damages (i.e., "pain and suffering") in medical malpractice cases. Wis. Stat. Ann. § 893.55(4)(d) (limiting recovery to $350,000). At this writing, the fate of Illinois' recently enacted statutory cap of $500,000 on non-economic damages in medical malpractice cases was yet to be resolved by the Illinois Supreme Court. John Flynn Rooney, "Tort-Law Uncertainties Put Brake on Pending Cases," *Chicago Daily Law Bulletin*, Vol. 143, No. 82 (April 26, 1997).

not as burdensome as in America. Or a firm might also choose to offset the increased costs associated with expanded Title VII liability by laying off workers and/or relying more upon machines and computers to do their jobs. One of my fellow judges even goes so far as to brush aside concerns about these potentially back-breaking costs, believing that costly prevention efforts will represent a corporate "investment in long-term freedom from liability." Flaum Op. at pp. 16-17. However, as **Judge Posner** cogently explains, that "investment" is essentially a form of taxation that will be borne, not just by faceless corporate entities, but by *all* in society:

> If the law requires the employer to do more than is reasonable to control harassment, it *will impose costs without any offsetting deterrent benefits. In the long run, these costs will be borne largely by consumers, in the form of higher prices for the employer's product, and workers, in the form of lower wages (because the higher costs are labor costs). Many consumers and workers are women, so women, who are the principal victims of sexual harassment, will pay a big part of the costs that employers incur as a consequence of excessively harsh principles of employer's liability.*

Posner Op. at p. 44.

I agree that eliminating sexual harassment in the workplace is a worthy and commendable goal, but we must not live under the misapprehension that *strict liability* will somehow bring about a Utopia in the workplace that will be free of sexual harassment. Given their existing liability for negligence, employers *already* have an incentive to eliminate harassment, to say nothing of the fact that they might wish to eliminate such conduct for reasons independent of their potential liability under Title VII (e.g., because harassment is disruptive of the workplace and thus undermines

productivity). **Judges Posner** and **Flaum** assume that *strict liability* will result in greater deterrence, but they fail to explain *how* this will happen. They effectively distill their argument into a cost-benefit analysis—that is, but for strict liability in *quid pro quo* cases, employers would presumptively prefer to incur the occasional cost of Title VII litigation rather than institute expensive measures to foster a "harassment-free" working environment. I am forced to disagree with this speculative theorizing, which is barren of support in empirical data.

In my view, the imposition of strict liability in the employment discrimination context represents a new and unwarranted extension of the doctrine of strict liability. The kind of cost-benefit reasoning that perhaps justifies strict liability for manufacturers of defective or faulty products is not convincing when applied to the employment arena. The manufacturer of a defective product may and oftentimes does *profit* from the sale of that product and arguably when it does, should be held strictly liable once it is established that a pre-determined fault or defect has caused harm. But obviously there is no gain to an employer when one of his supervisory employees engages in the sexual harassment of another employee.

In the products liability area, the imposition of strict liability is meant to impact on the *economic* decisions that manufacturers make about cold, tangible products made of metal, steel, iron, plastic and rubber, for "a manufacturer can anticipate certain hazards and 'guard against their recurrence' in a way that consumers cannot; similarly, consumers cannot investigate the 'soundness' of products." Marshall S. Shapo, 1 *The Law of Products Liability* § 7.05[4] (3d ed.1994). Manufactured products can be measured, analyzed, and tested by the manufacturer, and when a defect is identified, it can be remedied by replacing a dangerous machine or part with an

improved or new design that is safer, in an attempt to avert liability. The human "defects" in employees, by contrast, are largely hidden, elusive, and lie beyond the effective control of the employer. Only with great difficulty (if at all) can an employer measure and detect the human element that is "defective," i.e., the thoughts, feelings, and behavior of its employees or potential employees. Obviously, these "defects" are less susceptible to correction or "fixing" by the employer than is the case with defective products. Although **Judge Posner** argues that strict liability will result in "very careful" "monitoring" of supervisory employees, and thus a reduction in the amount of harassment in the workplace, I question whether such monitoring is feasible. *Human behavior is influenced by myriad factors that lie hidden below the surface—beyond the reach of even today's surveillance cameras and x-ray machines.* These factors include one's *upbringing*, moral *beliefs*, *heredity*, and *environment*. Additionally, as medical science is now discovering, *the ebb and flow of chemicals within the human body* (e.g., *hormones and neurotransmitters*) *can and do profoundly affect behavior, sometimes resulting in depression, anxiety, and even anti-social acts such as sexual harassment. Substance abuse, which often goes undetected in the workplace, can upset the normal chemical balance within the human body, ofttimes contributes to behavior that is inappropriate, immoral, or even criminal in nature.* Without prying deeply into the personal lives of its employees or potential employees, how is an employer supposed to have knowledge of, much less remedy, all of the factors that could possibly contribute to an employee's decision to engage in sexual harassment?

It is interesting to note that even under the existing negligence regime, an employer's attempts to avert liability by identifying and "weeding out" potential harassers in the

workforce are often frustrated by state employment laws, which can interfere with the employer's ability to assess whether an individual is predisposed to engage in harassment (or other unlawful conduct). Following a case in which one supermarket employee was raped by another, a women's rights activist in Boston, Massachusetts (affiliated with a national organization) reportedly called for employers "to investigate the backgrounds of employees more thoroughly," opining that "[i]f an employer is not going to look out for the safety of employees, who is?" Walter Olson, "How Employers Are Forced to Hire Murderers and Other Felons," *Wall St. J.*, June 18, 1997 at A23. Ironically, however, the kind of background investigation that might serve to protect other employees (and members of the public) is often prohibited by law and can lead to the employer being sued for employment discrimination. Wisconsin law, for example, generally forbids an employer from asking job applicants or employees whether they have an arrest record. Wis. Stat. Ann. §§ 111.331, 111.32, and 111.335.[33] Nor may a Wisconsin business base an employment decision upon an individual's prior criminal *conviction*, unless the circumstances of the offense "substantially relate to the circumstances of the particular job." Wis. Stat. Ann. §

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[33] In Wisconsin:

> Employment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employe, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge. . . .

Wis. Stat. Ann. § 111.335.

111.335.[34] Whether an employee or prospective employee has a past arrest or conviction for, let us say, sexual assault, would be *highly* relevant to the individual's inclination to engage in sexual harassment or even rape, but in most instances such information is off limits to Wisconsin employers. Illinois, similarly, does not permit employers to use arrest information in making employment decisions. 775 ILCS 5/2-103.[35] If strict liability is adopted as the standard in Title VII sexual harassment cases, the restrictions that bind employers in any states with laws similar to those of Wisconsin and Illinois will only be made more pronounced. Walter Olson, the author of a recent book aptly titled *The Excuse Factory: How Employment Law is Paralyzing the American Economy* (Free Press 1997), has described this bind or dilemma as yet another example of the "sued-if-you-do, sued-if-you-don't regime we impose on . . . business." Olson, "How Employers Are Forced to Hire Murderers," Wall St. J., June 18, 1997 at A23. In the context of employer liability for sexual harassment, I ask: "Why should courts search for ways to tighten the noose around employers' necks (i.e., strict liability), and thus further 'paralyze' the American economy?"

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[34] In 1996, the Wisconsin Senate passed a bill (S.572) to repeal these controversial provisions of Wisconsin law (which are opposed by business groups) but the legislation failed to pass the Wisconsin Assembly. According to press reports, similar legislation may be re-introduced this year. *See* Geeta Sharma-Jackson, "Bill Could Restrict Felons' Jobs: Lawmaker Wants to Let Employers, Not State, Make Hiring Decisions," *Milwaukee Journal-Sentinel*, May 10, 1997 at 1.

[35] Illinois' prohibition does not extend to prior convictions, which may be used "in evaluating the qualifications and character of an employee or a prospective employee." 775 ILCS 5/2-103.

We should recognize that "[m]en do not discard their personal qualities when they go to work," *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11, 15 (D.C.Cir.1940), and that the vexing social problem of sexual harassment will very likely persist in the workplace, to some degree, regardless of the fact that an individual enterprise may devote considerable resources to its eradication. An individual's disposition to sexually harass, despite years of educational programs promoting gender sensitivity and public awareness and condemnation of harassment, is engendered in him long before he enters the workforce (indeed, our armed forces are currently struggling with this very problem, and finding it most difficult to root out deeply-seated social attitudes, despite their best efforts). Is it fair and equitable that we require business and industry (and their stockholders) to *automatically* bear the costs of remedying one of the more troublesome social problems of the present day; a problem that business and industry did not create, and that society as a whole has been unable to solve, notwithstanding tremendous effort for lo these many years? If any governmental body should adopt new law that would dramatically affect human interaction in the workplace, it should be Congress, which could act with the benefit of expert testimony, whether it be from human resource directors, social workers, psychologists, psychiatrists, or others with knowledge and experience in the behavioral sciences. New departures in the law of sexual harassment—if any—must be left to the thorough deliberation, study, hearings and decision of the legislative body, and not resolved by judicial fiat.

An employer *should* be held liable for true sexual harassment in the workplace if the employer had prior *knowledge* of the alleged harassment and *failed to take appropriate and timely measures*. However, in our litigious society I fail to understand how this court can justify

expanding sexual harassment liability *beyond* the traditional, tested, true, logical, and common-sense parameters of the negligence standard, in favor of strict liability. Courts setting Title VII standards must proceed with caution and above all attempt to strike a balance between the rights, duties and obligations of employers and employees. Under a regime of strict liability, the unreported acts (or alleged acts) of even the lowliest supervisor would give rise to *automatic* liability for the employer. While the negligence standard is flexible and attempts to gauge the reasonableness of an employer's actions in a given set of factual circumstances, strict liability is a blunt legal instrument (a sledgehammer, if you will) that sexual harassment plaintiffs will wield to bludgeon employers and hold them liable for the improper conduct of their supervisory employees *regardless of the circumstances*. Delivering such a *gift-wrapped weapon* to Title VII plaintiffs would undoubtedly *tip the very delicate balance of the scales of justice in favor of Title VII plaintiffs and against employers. Strict liability, in the present context as set forth herein, amounts to overkill and fails to strike the balance we are obligated to continually strive to achieve if American industry and our never-ending search for justice are to co-exist and endure*.

Strict liability in sexual harassment cases could also spill over into other Title VII contexts. For example, as the law in this Circuit currently stands, hostile work environment claims for harassment on the basis of race are analyzed pursuant to a negligence standard. *See Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir.1991) ("*Plaintiff must be able to prove that the employer knew or should have known of the harassment and failed to take prompt remedial action.*"). Insofar as **Judge Wood** explains that "[s]exual harassment is no different . . . than other forms of discrimination," Wood Op. at p. 185, it is only a matter of time before we are

implored to cast aside *Daniels'* negligence standard in favor of strict liability for racial harassment, so that businesses will be made to pay a price when racism rears its ugly and uncontrolled head in the workplace, unbeknownst to the employer, *or perhaps in spite of the employer's best efforts to eliminate racism from the workplace*.

I am of the opinion that in fairness to the American worker, consumer, and employer, we should *reject the strict liability theories proposed by* ***Judges Posner, Flaum, Easterbrook and Wood*** *and hold employers liable in cases of true sexual harassment only when and if they knew or should have known of the harassment and failed to take proper remedial measures*. In the employment context, liability should be based on fault, and *the flexible negligence standard should be used to determine an employer's legal responsibility in Title VII sexual harassment cases*, regardless of *who* allegedly engaged in the harassment (supervisor vs. co-worker) or what *type* of harassment allegedly occurred (*quid pro quo* vs. hostile work environment). I fear that the approach advocated by some of my esteemed fellow judges will open the door to further interpretive problems and leave the law of sexual harassment even *more* inconsistent, complicated, and difficult to follow than it is today (indeed, speaking as a former trial judge, I question how trial judges will ever be able to make sense of and apply our disparate holdings in this *en banc* decision).

E. *Negligence Standard Applied*

Jansen has introduced sufficient evidence of PCA's possible negligence in failing to protect Jansen from sexual harassment to warrant a trial on this issue, and summary judgment in favor of PCA should be reversed so that there can be a limited jury determination on the negligence question. As **Judge Posner** points out, the company did counsel Antoni *about sexual harassment* on at least two

occasions prior to the alleged incidents involving Jansen. A jury will have to consider and weigh all of the facts and circumstances pertaining to PCA's alleged negligence, but a rational finder of fact might very well conclude, on the basis of the evidence in the record, that the company was on notice concerning Antoni's behavior and that its remedial measures (counseling) failed to prevent the problem from recurring in Jansen's case.

I reach the opposite conclusion with respect to Ellerth's case. As an initial matter, I concur with **Judge Posner** that Ellerth has waived her negligence claim, for Ellerth conceded, in her reply brief to the petition for rehearing, that § 219(2)(b) (negligence) "does not apply to this case." Posner Op. at p. 57. But even assuming that Ellerth's negligence claim has *not* been waived, summary judgment in favor of Burlington was proper and should be affirmed for the simple reason that the employer had no *knowledge* of the alleged harassment and was therefore not negligent. **Judge Wood** writes (and **Judge Flaum** agrees) that Ellerth's communications to "a number of Burlington employees" were somehow "sufficient to put the company on notice of the problem [with Slowik]." Wood Op. at p. 202. I disagree. Burlington's sexual harassment policy, which Ellerth received and read as part of the company's employee handbook, stated that the company would "not tolerate any form of sexual harassment in the workplace" and specifically directed employees to report their concerns about harassment *to either (a) their supervisor or (b) the human resources department*. Additionally, the employee handbook set forth the company's "open door" policy, which stated that if employees had concerns they did not feel comfortable discussing with their supervisors, they should raise those

concerns with the human resources department.[36] Although Ellerth claims to have mentioned her problems with Slowik to some co-workers, and to a manager in *another* division of the company, she admits that none of these individuals were her superiors at Burlington. In short, Ellerth failed to follow the procedures outlined in Burlington's sexual harassment policy by reporting Slowik's conduct to anyone at Burlington who was authorized to deal with such concerns, or to anyone designated to deal with such complaints by the sexual harassment policy. She failed to contact either (a) her immediate supervisor (Lawrence) or (b) the Human Resources Department. I agree wholeheartedly with **Judge Posner** that "with rights should come responsibilities," including, in Ellerth's case, the responsibility "to complain about Slowik *through proper channels*," i.e., by using the procedures spelled out in the company's published policy against sexual harassment. Posner Op. at p. 57.

Allegedly, Slowik told a number of off-color jokes (surprisingly, Ellerth cannot recall the content thereof) and allegedly made comments about Ellerth's legs, all in the presence of a Vice President of Burlington at a business luncheon. However, even assuming that these allegations are true, they are insufficient to establish that the company was on notice of sexual harassment, for, as **Judge Posner** notes, "the vice-president had no reason to think Ellerth offended by Slowik's banter; not all women would be." Posner Op. at p.

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[36] **Judge Diane Wood** inexplicably criticizes Burlington's policy as "brief" and "skimpy," without explaining how the policy falls short of her ideal. Wood Op. at pp. 196, 202. At any rate, under the strict standard **Judge Wood** espouses, the presence or absence of a sexual harassment policy would appear to have *no* bearing on a firm's liability, for the firm would be held responsible regardless of the measures it took (or did not take) to prevent harassment.

56. Indeed, one has to question whether Ellerth found the jokes offensive, for she cannot recall the content of even one of them.

II. JANSEN & "APPARENT AUTHORITY"

The discussion of Jansen's "apparent authority" claim in the Court's *per curiam* opinion and in the separate opinions of my fellow judges[37] fails to provide adequate guidance to judges (including the trial judge on remand), lawyers, and affected parties. Although both **Judge Wood** and **Judge Flaum** discuss "apparent authority" in the abstract, it is unclear whether or not they conclude that Jansen has come forward with evidence sufficient to survive summary judgment on this theory. On the other hand, from my reading of the record I am convinced that Jansen has failed to meet her burden of demonstrating that PCA, through its acts and omissions, created an appearance that Antoni was authorized to engage in acts of sexual harassment.

Apparent authority is "such authority as a principal intentionally or by want of ordinary care causes or allows [a] third person to believe that [his] agent possesses." *Black's Law Dictionary* 96 (6th ed.1991) (citations omitted); *see also Restatement (2d) Agency* § 219(2)(d). As **Judge Flaum** correctly notes, "apparent authority exists only 'to the extent that it is *reasonable* for the third person dealing with the agent to believe that the agent is authorized' and the third person actually believes the agent to be authorized." Flaum Op. at p. 20 (quoting *Restatement (2d) Agency* § 8 cmt. c). When analyzing an apparent authority claim, the proper focus must be on the perceptions of the third party (in this case the

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[37] Judge Manion and I are in substantial agreement concerning the concept of "apparent authority" and its application to sexual harassment cases. *See* Manion Op. Part III.

plaintiff Jansen) and whether those perceptions were reasonable. One scholar has observed that "[i]n the sexual harassment context, the principal's actions must have given the victim a *reasonable* belief that the perpetrator of the harassment had authority to harass. For this reason, apparent authority seems an *unlikely* basis for employer sexual harassment liability." Phillips, *Employer Sexual Harassment Liability*, 44 Vand. L. Rev. at 1247-48.

Judge Wood co-mingles her discussion of "apparent authority," a concept set forth in *Restatement* § 219(2)(d), with her analysis of vicarious liability under § 219(1). Moreover, **Judge Wood**'s interpretation of "apparent authority," like her analysis of *respondeat superior* liability, is far too broad. According to **Judge Wood**, who once again reaches out to expand concepts set forth in the *Restatement*, we should not ask whether the supervisor had apparent authority to harass but instead whether he had the apparent authority to "hire, assign, supervise, etc." Wood Op. at p. 190. If the supervisor appeared to have such authority and engaged in harassment, then according to **Judge Wood**, "liability [for the employer] should result." Wood Op. at p. 190. It seems to me that the question **Judge Wood** would have a jury answer is far too broad, for the mere fact that an employee occupies a supervisory role to some degree does not suffice to establish liability under an "apparent authority" theory. Rather, as the trial judge in *Jansen* explained:

> liability is based upon the fact that the agent's position facilitates the consummation of the [tort], *in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.*

Jansen, 895 F.Supp. at 1066 (quoting *Restatement (2d) Agency* § 261 cmt. a) (emphasis added).

I have been unable to discover any evidence in the *Jansen* record from which a rational jury could conclude that Antoni, however improper his conduct may have been, "appear[ed] to be acting in the ordinary course of . . . business" when he allegedly engaged in the acts of sexual harassment. Jansen claims that she was aware of various unsubstantiated rumors to the effect that (1) Vicki Wiley left PCA because Antoni had "give[n][her] a hard time," and (2) PCA tolerated workplace affairs and possibly even sexual liaisons (including one or two that supposedly involved Antoni) on the premises. Mere office gossip and banter falls far short of establishing that PCA either condoned or licensed sexual *harassment*, nor would unsubstantiated rumors permit a *reasonable* person to conclude that such harassment was part of the "ordinary course of business" at PCA. Although the plaintiff self-servingly claims that she was unaware of PCA's sexual harassment policy, the deposition testimony of Henry Weil (Director of Operations) and Antoni makes clear that the policy was posted conspicuously in at least one if not *two* locations, *prior* to Jansen's complaint, including a bulletin board on the first floor near the entrance to the plant, which Jansen admitted passing "every single day." PCA's policy—which was explicit, detailed, in writing, and posted where employees could see it—made clear that harassment would not be tolerated at PCA and encouraged employees to report any and all instances of such harassment to "appropriate management." A rational jury, on the basis of this record, could not find that PCA failed to post its anti-harassment policy conspicuously enough, nor could it conclude that the plaintiff had a *reasonable* belief that PCA authorized, condoned, or sanctioned sexual harassment. Therefore, although I see merit in allowing Jansen's negligence claim to go forward, I do not believe that her "apparent authority"

claim should proceed to trial because the facts of her case are plainly insufficient to support such a claim.

As the experienced trial judge recognized, the *weak evidence* adduced by the plaintiff to support her "apparent authority" argument is more than overwhelmed by evidence that Jansen *knew* Antoni "was operating outside the scope of his apparent authority in harassing her." *Jansen*, 895 F.Supp. at 1067. "If a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability." *Restatement (2d) Agency* § 166 cmt. a (quoted in *Jansen*, 895 F.Supp. at 1066). Thus, Jansen's knowledge or awareness that Antoni was operating outside the scope of his employment *completely* defeats her "apparent authority" argument. In addition to the posted anti-harassment policy,[38] there is further evidence of Jansen's awareness that sexual harassment was not authorized at PCA, for when Jansen did make up her mind to complain about Antoni (in mid-January 1993, at which time the alleged harassment had been going on for at least 15 months), she had no difficulty whatsoever in knowing how to proceed. Without hesitation, she contacted the proper individual at PCA (Human Resources Director Paul Migala), who took prompt action to address the situation. As the district court noted, the existence of a mechanism for dealing

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[38] At this juncture, I note another area of disagreement with **Judge Wood**'s opinion. **Judge Wood** asserts that the existence of a policy against sexual harassment does not affect an employer's liability under an apparent authority theory. Wood Op. at p. 190. However, the existence of a publicized sexual harassment policy should logically and legally create awareness that sexual harassment is frowned upon by the company and will not be tolerated. Under these circumstances, a reasonable belief in the supervisor's "authority to harass" would be impossible.

with sexual harassment not only serves to negate any finding of negligence on the part of the employer, it also quite obviously "*removes the guise of apparent authority from the harassing supervisor.*" *Jansen*, 895 F.Supp. at 1067. In other words, because "Jansen plainly knew that she had some recourse at [PCA] . . . she cannot now claim that she believed Antoni's conduct to be sanctioned by [PCA]." *Id.* The evidence in the record, considered as a whole, falls short of establishing that Jansen had reason to believe that PCA authorized, condoned, or sanctioned acts of sexual harassment. Thus, with respect to Jansen's apparent authority claim, we should affirm the trial judge's grant of summary judgment in favor of PCA.

"Apparent authority" is a legitimate "agency principle," *see Restatement* § 219(2)(d), but if it is interpreted too broadly, or applied without regard to the facts, it becomes the functional equivalent of strict liability. I agree with **Judge Manion** that "it is hard to imagine a scenario where an employee *reasonably* believes her supervisor's job description includes the right to harass her." Manion Op. at p. 163 (emphasis added). This is particularly true in cases such as *Jansen*, where the employer had promulgated and publicized a clear policy forbidding sexual harassment in the workplace. *See* Phillips, *Employer Sexual Harassment Liability*, 44 Vand. L. Rev. at 1242-43 ("Claims that a supervisor had . . . apparent authority to harass almost certainly will fail if, as is increasingly common today, the employer maintains an anti-discrimination or anti-harassment policy."); *see also* Manion Op. at p. 161 n. 4 (and cases cited therein).

III. PROCEDURAL ISSUES: WAIVER

In evaluating **Judge Wood**'s and **Judge Flaum**'s analyses of what constitutes *quid pro quo* harassment, I have previously observed that neither of the cases before us involved a true *quid pro quo* as defined in our case law. Even

if Jansen and Ellerth *did* suffer from *quid pro quo* harassment, however, under our case law they have waived their *quid pro quo* claims because they failed to raise them in their respective EEOC complaints or district court pleadings. In short, I disagree with my fellow judges, who either assume (or in **Judge Wood**'s case, explicitly argue) that Jansen and Ellerth have preserved their claims of *quid pro quo* harassment for appellate review. Wood Op. at pp. 198-199.

Jansen did not raise a *quid pro quo* allegation until almost the overtime period in the lawsuit, more than a year after filing her complaint, when she submitted a memorandum and supporting affidavit in opposition to PCA's motion for summary judgment. She had not previously alleged that Antoni suggested any kind of explicit or implicit sexual *quid pro quo* in *her report to PCA, her filing with the Equal Employment Opportunity Commission ("EEOC"), or her complaint filed with the district court.* Nor was this allegation ever listed in Jansen's detailed and exhaustive handwritten "log" (allegedly chronicling Antoni's harassment of her during the fifteen-month period prior to her complaint). In her deposition, Jansen not only failed to make such allegations, she went so far as to concede that her performance review was "[n]either discriminatory nor retaliatory" (Jansen received a satisfactory evaluation and a raise in salary, retroactive to the time when the review was due). Jansen further testified, in her deposition, that she reported *all* alleged acts of sexual harassment to PCA and to the EEOC.

Jansen's belated assertions of *quid pro quo* harassment run afoul of well-established and important procedural rules, which for reasons unexplained the court has chosen to ignore. *Title VII plaintiffs who wish to bring a claim in federal court must initially set forth their claim in a filing with the EEOC, or they are barred from pursuing the claim. Cheek v.*

Western and Southern Life Ins. Co., 31 F.3d 497, 500 (7th Cir.1994). This rule serves to "giv[e] the employer some warning of the conduct about which the employee is aggrieved," *Id.* (citations omitted), and permits the EEOC to conduct an independent investigation in order that it may assist the parties in determining whether court proceedings are necessary. 42 U.S.C. § 2000e- 5(b). Jansen's EEOC filing made no allegation of *quid pro quo* harassment, nor did it set forth any facts that would support such a claim.

A civil plaintiff is barred from injecting new allegations into his or her case by raising them *after* the defendant has filed a motion for summary judgment, for *such a strategy fails to give adequate or fair warning as to the claims the defendant must address and defend against. Andree v. Ashland Co.*, 818 F.2d 1306, 1314 n. 11 (7th Cir.1987) (district court properly excluded a claim made for the first time in opposition to summary judgment). **Chief Judge Posner**, in an opinion joined by **Judge Rovner**, very recently noted that *this court has been "critical of efforts to patch up a party's deposition with [her] own subsequent affidavit." Russell v. Acme-Evans Co.*, 51 F.3d 64, 67 (7th Cir.1995). Similarly, in an opinion authored by **Judge Kanne** and joined by **Judge Flaum**, this court has unequivocally stated that "*parties cannot thwart the purpose of Rule 56 [summary judgment] by creating issues of fact through affidavits that contradict their own depositions.*" *Darnell v. Target Stores*, 16 F.3d 174, 177 (7th Cir.1994) (quoting *Miller v. A.H. Robbins Co., Inc.*, 766 F.2d 1102, 1104 (7th Cir.1985)). By raising allegations of *quid pro quo* harassment in her affidavit (after failing to raise them in her EEOC complaint and after conceding in her deposition that her performance review was not discriminatory) Jansen clearly attempted to use her affidavit for the improper purpose of "retract[ing] or explain[ing] away concessions that [she made] in [her]

deposition." *Russell*, Jansen, 51 F.3d at 67. Which of Jansen's three statements are we to believe: her EEOC filing (submitted in early 1993, shortly after the harassment allegedly occurred), her sworn deposition testimony, or her sworn affidavit?

According to Seventh Circuit case law, because Jansen failed to raise her *quid pro quo* harassment claims in a timely fashion, she has *waived* those claims on appeal. I am at a loss to understand how this court can ignore its own precedents and rely upon allegations that were, in all likelihood, created and conjured up by the plaintiff "at the last minute" in order to bolster her case. *See Russell*, 51 F.3d at 67 (observing that "[a]lmost all affidavits submitted in litigation are drafted by the lawyers rather than by the affiants."); *Darnell*, 16 F.3d at 177; *Andree*, 818 F.2d at 1314.

Many of my observations concerning procedure in *Jansen* apply with equal force to Ellerth, *who also neglected to raise a claim of quid pro quo harassment in either her EEOC filing or her district court complaint*. Until today, we have followed the principle, as set forth by **Judge Rovner** in *Saxton v. American Telephone & Telegraph*, 10 F.3d 526, 533 (7th Cir.1993), that when a Title VII plaintiff "first attempt[s] to articulate a basis for a *quid pro quo* claim in her appellate briefs . . . that, of course, is too late." *Id.* (declining to reach the merits of plaintiff's *quid pro quo* claim because she relied "solely" upon a hostile work environment theory at the district court level).

What lessons are future litigants to derive from the court's abandonment of well-established procedural rules in the two cases before us today? Is the message that rules about waiver no longer exist? We would be well-advised not to cast aside the procedural rules in either Jansen's or Ellerth's case for a cause and also for the purpose of making the road wider and easier for future Title VII plaintiffs, nor should we use the

cases before us as a vehicle for announcing a new strict liability standard that is specific to *quid pro quo* cases. This kind of approach will only serve to undermine respect for our precedents and encourage other plaintiffs (and their lawyers) to flout important procedural rules, to the detriment of the judicial process.

IV. CONCLUSION

I concur with the majority that the district court's dismissal of Jansen's claims of retaliation and intentional infliction of emotional distress was proper, and I also agree that *Jansen* should be remanded in order that a jury may address the limited question of whether PCA was negligent in preventing Antoni's alleged hostile work environment harassment. However, as discussed, I am of the opinion that Jansen has waived her *quid pro quo* claim and I do not believe that Jansen has come forward with evidence sufficient to survive summary judgment on her apparent authority claim.

Most importantly, I am not persuaded that this court should do an "end run" around the Supreme Court's decision in *Meritor* by adopting strict liability in *quid pro quo* cases, as proposed by **Judges Posner**, **Flaum**, **Easterbrook** and **Wood**. Factually, neither of the cases before us involved true *quid pro quo* harassment, and indeed, the plaintiffs have waived any such claims. Therefore, even if I were to agree that strict liability is the proper standard in *quid pro quo* cases (the common thread which unites **Judges Posner**, **Flaum** and **Wood**), the two companion cases before us are hardly the proper vehicle for announcing such a rule.

In the more than thirty years since Congress outlawed sex discrimination in the workplace (*via* a "last minute" amendment to Title VII) our nation's legislature has been silent concerning the meaning and scope of sex discrimination, and it has not, to date, enacted a statutory

definition of sexual harassment. This congressional silence, possibly attributable to pressure from special interest groups, has left a vacuum to be filled by the courts, and as the opinions of judges across the land unfortunately demonstrate, a number of courts have been all too willing to interpret sexual harassment law expansively. The current state of affairs—legislative silence coupled with energetic judicial "gap-filling"—has done violence to the Framers' intent that lawmaking authority be vested in the legislative branch, and not the judiciary. It is my hope that Congress will address this issue and relieve the overburdened court system of the present and anticipated influx of oft-times unfounded sexual harassment litigation. Unlike a court of law the Congress may investigate, hold hearings, and receive input from a wide range of experts, as well as those who are likely to be affected by changes in sexual harassment law. Congress, in the exercise of its wisdom and judgment, might provide for alternatives to strict liability that certainly would not be quite as far-reaching as strict liability. For example, Congress could provide more extensive remedies (e.g., double or treble damages) in cases where it could be established that (a) the plaintiff suffered true *quid pro quo* harassment, and (b) the employer knew of the harassment but failed to take appropriate remedial measures. Such an approach would retain the well-accepted and tested negligence standard, but increase the price tag for employer negligence with respect to *quid pro quo* harassment. This is but one example of how the nation's constitutionally designated lawmaking body might choose to deal with the problem of *quid pro quo* harassment, while still allowing employers to defend themselves by demonstrating that they lacked knowledge of the harassment and/or took reasonable measures to prevent the same.

In closing, I observe that "sexual harassment" is in the eyes of the beholder. One person's idea of friendly banter is

another's idea of harassment. In the highly-politicized environment surrounding the volatile issue of sexual harassment in the workplace, neither employers nor employees have a clear understanding of what conduct the law allows, much less what it prohibits. Congress, as noted, has been silent. And despite a profusion of reported cases on sexual harassment, the judicial branch has failed to reach consensus about the meaning and extent of Title VII's prohibition against sexual harassment (indeed, the eight separate opinions submitted by members of this court today are powerful proof that the law in this area is unclear and unsettled). As it stands today, the law of sexual harassment "tend[s] to avoid giving employers definite rules to obey but instead lay[s] out sweeping if vague aspirations that are given the force of law. . . . No one really knows where these concepts begin and leave off; all employers know is that if they guess wrong some future jury or judge may decide that they have broken the law." Olson, *Excuse Factory* at 3. In light of this uncertainty and confusion, I believe it is particularly unfair and most unreasonable to hold an employer *automatically* (strictly) liable for the alleged missteps of an alleged "supervisor," irrespective of the employer's lack of *knowledge* concerning the "harassment" and regardless of his efforts to discourage harassment in the workplace. *Strict liability tips the time-honored and respected scales of justice in favor of the plaintiff.*

EASTERBROOK, *Circuit Judge*, concurring in part and dissenting in part. Chief Judge Posner's approach to this subject has many virtues, simplicity and the creation of desirable incentives prominent among them. I would join his opinion if I thought that federal judges were free to devise a law of vicarious liability for Title VII cases. Yet we are not. Title VII creates a national anti-discrimination rule but does not deal with all discrimination in the labor force. Only employers and their agents are covered. 42 U.S.C. § 2000e(b). Who speaks or acts for the employer? Who is an agent? Title VII does not say. It does not even hint. The answer must come from elsewhere. When a federal statute is silent, we obtain the necessary rule from state law, unless application of state law would undermine a federal norm. *Atherton v. FDIC*, 117 S.Ct. 666, 670, 136 L.Ed.2d 656 (1997) (collecting cases); *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312 (7th Cir.1997).

Meritor Savings Bank, fsb v. Vinson, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), directs the inferior courts "to look to agency principles for guidance in this area." "Agency principles" come from state law, as the Court implied by citing the *Restatement of Agency*, a distillation of decisions by state courts. "Agency principles" answer the question: who can make commitments, and whose acts can create liability, for a corporation? Like other questions about a corporation's organization and distribution of powers, and about the liability of its investors (who really pay judgments against corporations), agency depends on state law, for it is state law under which corporations exist. Corporations are complex webs of contracts, themselves specialties of state law. Thus *Meritor* tells us to "look to," not "make up," agency principles. One can "look to" principles only in an existing body of law, which means state law, for there is no

free-floating common law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Relations such as agency that are undefined by federal statute, like other elements of the background against which federal rules operate, come from state law—either directly, when the Rules of Decision Act, 28 U.S.C. § 1652, requires, or indirectly when federal law absorbs a needed rule from state law. (The difference between direct and indirect use of state law does not matter to these cases.) Although use of state law to determine the extent of vicarious liability entails disparity across state borders, even within a single firm, this is no more an objection than it would be for other torts or contracts. Suppose Slowik entered into a contract with Ellerth raising her salary, or made a defamatory statement about her (as she says he did, when he implied in conversation that she had capitulated to his demands). State law would determine whether the raise stuck (or whether someone higher up had the final word), and whether the slander was within the scope of employment—which is to say, state law determines who is the firm's agent, and for what purposes. Who speaks or acts on behalf of a corporation is a fundamental question of corporate organization, all but invariably resolved under state law, as *Atherton* shows even for firms chartered by the United States.

Absence of a national rule means that firms must answer for supervisors' acts in some states but not others. Many of my colleagues object to the possibility of variation, but if different treatment of the same facts in different states authorized the creation of federal common law, *Swift v. Tyson*, 41 U.S. 1, 16 Pet. 1, 10 L.Ed. 865 (1842), would hold sway today, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979), would have come out the other way, and a host of cases from the last 20 years using state law to decide subsidiary, but dispositive, questions

in litigation under federal statutes would be overthrown. E.g., *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991); *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *Marrese v. American Academy of Orthopdic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981); *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978); *Miree v. DeKalb County*, 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977). Reverse the uniformity question and ask: Why should an act of sexual harassment by a supervisor be attributed to the firm under state law but not under Title VII (or under Title VII but not state law)? Federal common law achieves horizontal but not vertical uniformity.

Title VII is no different, in needing the assistance of state-law principles, from the antitrust, aviation, banking, securities, and other civil rights laws, the subjects of the seven cases just cited. *O'Melveny* and *Kamen* in particular use principles of state law to address questions about responsibility of a firm for acts of employees or agents, although in both cases liability would be based on national

law.[1] Employment is a contractual relation, see *Hishon v. King & Spalding*, 467 U.S. 69, 74, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), which implies that the line between an employee (covered by Title VII) and a partner or independent contractor (not covered) comes from state contract law. Cf. *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir.1996) (using common law principles to distinguish employees from independent contractors, but without discussing choice of law). The question whether a person can bind the employer by contract—for example, by settling litigation under Title VII—similarly depends on state law. *Morgan v. South Bend Community School Corp.*, 797 F.2d 471 (7th Cir.1986). Cf. *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). In *Peacock v. Thomas*, 116 S.Ct. 862, 133 L.Ed.2d 817 (1996), the Supreme Court held that state law determines when an investor is vicariously liable for a federal-law judgment against the corporation. These principles likewise point to state law to determine when the corporation is vicariously liable for an employee's acts.

None of the parties argues that federal statutory law specifies the extent of an employee's ability to bind the employer. Federal law requires complainants to file their

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[1] The holding in *O'Melveny* is that state law governs whether an employee's or agent's knowledge is imputed to a bank that has been taken over by the FDIC, or to the FDIC as its receiver, while federal law determines whether a financial institution that acts with particular knowledge is liable. The holding of *Kamen* is that state law determines whether investors in a mutual fund regulated by the Investment Company Act must make demand on the board of directors before commencing a derivative action (that is, an action as the corporation's agents) seeking recovery under federal law. In each case, an adverse decision on the agency issue under state law would have scotched the substantive claim based on federal law.

grievances initially with state agencies, 42 U.S.C. § 2000e-5(c), the better to coordinate application of national and local anti-discrimination rules. Why undercut coordination by adopting for purposes of Title VII a set of agency rules that differs from those the state would apply to the same claim of discrimination? Preserving vertical uniformity is a strong reason *not* to have federal rules. Although the parties have briefed these cases on the assumption that federal law governs, we are entitled to disregard that forfeiture and to decide independently which body of law supplies the essential principles. *Kamen*, 500 U.S. at 99. See also *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 445-48, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993).

State courts devising principles of vicarious responsibility are not stuck in the 1940s or condemned to use irrelevant analogies. Corporate law, actively monitored and adjusted by state courts, is one source of rules for determining when a manager's acts are attributed to the firm. Many states are developing distinctive bodies of law about workplace harassment, sometimes holding employers liable for acts perpetrated by supervisors. Some of these cases have been decided under state or local anti-discrimination laws. State courts may interpret their usual agency principles when adjudicating claims of discrimination, just as we have been invited to do, or they may devise a specialized body of agency doctrine for discrimination cases, as several of my colleagues prefer. *Green Hills Country Club v. Illinois Human Rights Commission*, 162 Ill.App.3d 216, 113 Ill.Dec. 216, 514 N.E.2d 1227 (5th Dist.1987), shows that Illinois holds a firm answerable for the kinds of supervisory conduct involved in our cases. A statute dealing with vicarious liability in discrimination cases supports its conclusion. 775 ILCS 5/2-102(D). State statutes and judicial decisions alike supply the

law that we should use. (Recall what *Erie* held: that statutory and common law are treated the same under the Rules of Decision Act.) Illinois would hold both employers vicariously responsible for the conduct of Ellerth's and Jansen's supervisors.[2] Federal law then makes that conduct actionable.

Illinois does not draw a line, for purposes of vicarious liability, between quid pro quo demands and hostile work environments. We should not superimpose such a distinction on a body of agency law that does not require it. Not unless Title VII itself requires that distinction, and it does not. Title VII forbids sex discrimination in employment. Insistence on performance of sexual services as a condition of receiving the pay or position to which a person is otherwise entitled is sex discrimination; so is the maintenance of an environment in which women are made to feel unwelcome or miserable, when men performing the same tasks are treated well. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Recognition that there are multiple ways to discriminate, in violation of federal law, does not imply different rules of vicarious liability.

Distinctively federal rules of vicarious liability in discrimination cases would be justified if application of the state's law of agency undermined a federal interest. State law then is preempted, and the court must fashion a substitute. In *Community for Creative Nonviolence v. Reid*, 490 U.S. 730,

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[2] Chief Judge Posner cites an impressive number of opinions in which Illinois courts declined to impose *respondeat superior* liability for wrongs employees committed against third parties, such as customers, shoplifters, guests, students, and patients. *Green Hills* is that state's only appellate case dealing with sexual harassment of co-workers, and given 775 ILCS 5/2-102(D), we lack a good reason to suppose that the Supreme Court of Illinois would disapprove the approach *Green Hills* took.

109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), the Court devised a special agency rule for copyright cases, believing state rules to be inconsistent with one of the aims of the federal law. No one contends that Illinois' law of agency and Title VII are similarly incompatible. Cf. *Johnson v. Fankell*, 117 S.Ct. 1800, 1804-07, 138 L.Ed.2d 108 (1997) (collecting cases about the incompatibility caveat to the use of state law). Chief Judge Posner's assertion that my approach "implies that by a stroke of a pen Illinois could eliminate all Title VII liability in that state that depended on the principles of agency law" (slip op. at 37) slights the doctrine that state law is used only if compatible with the federal norm. If a risk that state law may try to undercut the interest protected by federal law means that state law does not apply, then state law would *never* be used to resolve subordinate issues in federal litigation. A state's ability to set a one-day statute of limitations for personal-injury claims would allow it to wipe out liability for constitutional torts under § 1983, which in turn (on my colleague's view) would foreclose resort to state law no matter what its actual period of limitations was. What the Supreme Court has told us to do is different: we use state law unless its actual period of limitations is so short or so freighted with conditions that its application imperils vindication of the federal right. *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984). See *Morgan*, 797 F.2d at 475; *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir.1989). A state may set a period of limitations as long as it likes, or apply lax tolling rules; a longer time to sue does not undermine the interest protected by the federal law. See *Gosnell v. Troy*, 59 F.3d 654, 656 (7th Cir.1995). Similarly a state may expand employers' liability, by imputing many supervisors' acts to the firm, without offending Title VII. My colleagues do not identify a single state agency rule, anywhere in the nation, that is

incompatible with Title VII. Irony lies in adopting a novel federal rule—one less favorable to victims of workplace torts than actual state rules—in order to avoid a phantom "hostile" state rule.

Employers' (and employees') main source of protection from silly rules is generality: a state cannot affect claims under federal law without affecting claims under state law too. Nothing I have written here implies that federal courts should pay heed to a law such as: "For purposes of litigation under Title VII, supervisors' acts are attributed to the firm if . . . ." Illinois' agency rules largely favor claims by employees. How far a state may move toward negating principles of *respondeat superior* is not a question we need engage today. Answering that question is impossible in the abstract, and hard in the concrete; some difficulties, at least, therefore are avoided if we disregard state law. But inventing federal common law is a dubious project for reasons both legal and practical. The legal reasons I have covered. The practical objections include the difficulty of formulating a good rule. Why should we think that our latest brainstorm will really be an improvement? Most mutations in biology and law alike are inferior. Common law of agency has stood the test of time in a way my colleagues' proposals have not. Any federal rule also creates vertical disuniformity: the same supervisory act is imputed to the firm for purposes of state but not federal law, or the reverse. Perhaps more surprisingly, a federal rule will do little to create horizontal uniformity. Thirteen federal courts of appeals comprising some 200 judges are bound to see these issues differently—the one proposition conclusively established by today's welter of opinions—and the Supreme Court lacks the time (and may lack the inclination) to superintend a national body of agency law. Admiralty, the most distinctive body of federal common law, has taxed the Court's resources and patience. Discrimination cases are

more plentiful by two orders of magnitude, yet in the 33 years since Title VII was enacted the Supreme Court has heard only two involving workplace harassment. Prospects for a uniform federal common law in this field are dim.

Title VII does not preempt state anti-discrimination laws, and it is unwise to use one set of agency rules for state purposes and a completely different set for the same acts by the same supervisors under Title VII. Several of my colleagues' opinions endorse strict liability for supervisors' quid-pro-quo demands, even though *Meritor* rejected that approach for similar claims.[3] Now it may be that agency principles often imply automatic corporate liability for supervisors' misconduct, as Judge Wood concludes (and as *Green Hills Country Club* shows), but following normal agency principles when they produce that outcome does not offend *Meritor*; this is what *Meritor* requires us to do. Judge Wood's opinion reaches sound conclusions about both the law and the facts; I join it in every respect but one.

The exception is that I would treat both *Jansen* and *Ellerth* as claims of hostile working environments. Although, on the approach Judge Wood and I take, there is no material legal difference between quid-pro-quo and hostile environment claims, this distinction matters to a majority of the court, so it is helpful to get the nomenclature straight. Slowik implied that he would hinder Ellerth's advancement if she did not provide sexual favors, but when she refused he did not carry

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[3] Taylor, the supervisor in *Meritor*, allegedly demanded that Vinson perform sexual acts to show "gratitude" for his assistance in securing her employment and advancement; she says that she complied. See *Vinson v. Taylor*, 753 F.2d 141, 143-44 (D.C.Cir.1985). A woman forced to pay a bribe (in sexual services) is a victim of sex discrimination, because a male employee would have received the same salary or advancement without bribing the supervisor.

through. He did not reduce her status or salary; indeed, he secured a promotion for her. Ellerth quit only because the working environment was spoiled by the sexual innuendo and offensive touchings. Antoni, like Slowik, also relented when his victim balked. The delay in Jansen's raise did not cost her anything; the employer provided back pay, and Jansen does not contend that she was entitled to interest on this sum. (For all we know, the employer paid interest.) Both plaintiffs therefore received their injuries exclusively from a supervisor's boorish conduct, rather than via the pay envelope or by submitting to unlawful demands. Both Slowik and Antoni solicited other persons to pay tribute (in the form of sexual acts) in order to receive benefits to which they were entitled. That is not only attempted extortion of the subordinate but also attempted theft from the employer, because Slowik and Antoni tried to use the company payroll to finance the acquisition of personal sexual services. Extortion and theft, whether completed or attempted, are crimes, and the incidence of this conduct might decrease if prosecutors treated them that way. What matters for current purposes, however, is that the attempts failed, leaving only the unpleasant working environments.

MANION, *Circuit Judge*, joined by POSNER, *Chief Judge*, concurring and dissenting. Although I recognize that the possibility of any reader (other than members of this court) finding this opinion buried amid 200 pages is remote, I will nevertheless forge ahead. I write separately not to propose yet another standard of employer liability in cases of a supervisor's sexual harassment, but rather to condense some of the areas of agreement and dispute set out by the various writings submitted by other members of the court. At this point, four of the circuit judges have proposed distinct standards of liability in cases where a supervisor sexually harasses a subordinate. The central question is whether strict liability should be applied, and if so, for what? And if it is applied, should it be against an employer for all forms of sexual harassment in the workplace, or only for quid pro quo harassment? And then we need to define quid pro quo harassment—is it for some job action taken against an employee, or is the mere threat of a job action enough? Further, what level of supervisor can inflict the company with strict liability—a high-level supervisor who has the independent and unreviewable authority to execute, or a lower-level supervisor, even one who might be better described as a co-worker, whose input in job actions is limited to routine recommendations and job reports to a higher decision-maker?

If we were writing the law on a clean slate, I would be inclined to join Judge Coffey in imposing a singular, consistent standard for all types of harassment: negligence. That approach recognizes the unfairness in imputing vicarious liability to an employer for a supervisor's errant, personal and illegal acts that have nothing to do with the employer's business or the supervisor's responsibilities. But the slate is not clean. Unfortunately, as revealed by the volume of writings presented under the two cases decided

today, the slate is marked with many confusing and even conflicting standards that give trial courts little guidance in this sensitive area. Nevertheless, I strongly endorse much if not most of what Judge Coffey has presented in his very detailed and thorough analysis. Although I am not able to join the bottom line of his concurrence, I strongly endorse his approach on many of the underlying issues.[1]

Given the state of the case law, it is my conclusion that Chief Judge Posner has fashioned an approach that is in line with *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), our own precedent in this area, and common sense. It is a practical and facile approach that draws needed bright lines (or at least brighter ones) in a dim area of employment law involving dimwitted behavior by offending employees. Judge Posner's "company act" approach helps sort out an issue that has confounded courts since *Meritor* was decided more than a decade ago. Its power lies in its underpinnings: there is no existent "law of agency" able to answer the questions before us today, and the Supreme Court itself recognized that common law principles are not transferable "in all their particulars to Title VII." 477 U.S. at 72.

Judge Flaum has drawn some lines that appear to have attracted at least a plurality of the other judges on the court. It is a rather back-to-basics approach that is commendable for several reasons. Primarily, it retains the distinction between

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[1] *See ante* (Coffey concurrence) at 80-82 (discussing definition of "supervisor" within the context of Title VII and the National Labor Relations Act); 93-94 (discussing what constitutes a "materially adverse employment action"); 98 (introducing and at the same time rejecting the concept of "*attempted* quid pro quo harassment"); at 132 n.38 (arguing that an anti-harassment policy makes a reasonable belief in apparent authority "impossible").

hostile environment harassment and quid pro quo harassment, and it imposes a consistent standard of liability (negligence) in cases of hostile environment harassment no matter whether the harasser is a supervisor or co-worker. In that regard, however, I am less enthusiastic about the somewhat nebulous "heightened" standard of care in cases where the harasser is a supervisor rather than a co-worker. But in most respects Judge Flaum's approach is consistent with Chief Judge Posner's, the principal difference being—and it is a major one—how to treat a supervisor's threats of a job action if the employee does not comply with his sexual demand. I agree with Chief Judge Posner and Judge Kanne that threats without tangible job consequences ("company acts" such as a demotion or firing) should not impose on an unsuspecting employer the harsh penalty of strict liability.

Judge Wood's approach differs substantially from the other three by favoring one standard of liability in all cases of supervisory sexual harassment. Under that standard, an employer is liable if the supervisor committed harassment during the course of his supervision. If so, then the harassment is within the scope of employment even if his motivation was entirely personal and unrelated to the employer's business. If outside the scope of employment, then liability under this approach results if (1) the employer is negligent in failing to address the harassment; or (2) the supervisor has apparent authority to take the employment actions at issue. In addition, Judge Wood apparently has accepted Judge Easterbrook's standard of applying state laws of agency, so that an employer's liability under Title VII depends upon which state law a court applies. Without saying so, Judge Wood's approach effectively imposes strict liability for all sexual harassment, and with Judge Easterbrook's wrap of a 50-state standard, I find it unacceptable.

While these four distinct approaches do not cover every option, there are common threads running through the approaches of Judges Posner, Coffey, and Flaum that are consistent and important. Each favors a negligence standard of employer liability if the alleged harasser is a co-worker of the victim, which includes low-level supervisors who in practical terms are acting as co-workers and not supervisors when they harass. This is consistent with all of our recent decisions addressing this issue. *See McKenzie v. Illinois Dep't of Transportation*, 92 F.3d 473, 480 (7th Cir.1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir.1995); *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir.1994). The alleged harasser in *Baskerville* was a low-level supervisor, and nothing in today's decision should be interpreted to mean that a negligence standard is inappropriate in cases where the harasser happens to outrank the victim in the company's hierarchy.

In addition, a majority of the court has decided to retain a standard of strict liability in cases of actual quid pro quo harassment, or for what Chief Judge Posner terms "company acts." This is consistent not only with *Horn v. Duke*, 755 F.2d 599 (7th Cir.1985), but the decisions of other circuits as

well.[2] Both Judge Flaum's approach and Chief Judge Posner's retain the distinction between hostile environment harassment and quid pro quo harassment. Given the state of the law, this distinction makes sense; a "company act" such as a supervisor's termination of an employee who refuses to have sex with him is much more severe than the general creation of a hostile environment (which typically consists of multiple acts of harassment actionable only in combination by creating an offensive work environment). The company

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[2] At least eight other circuits have confronted the issue of liability for quid pro quo harassment. Each has either expressly embraced a standard of strict liability or has commented that other courts uniformly impose such liability. *See Torres v. Pisano*, 116 F.3d 625, 1997 WL 290196, at *6 (2d Cir. June 3, 1997) ("liability for quid pro quo harassment is always imputed to the employer"); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir.1997) ("In cases involving quid pro quo harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct."); *Canutillo Independent School Dist. v. Leija*, 101 F.3d 393, 397 (5th Cir.1996) ("Courts have held an employer strictly liable for '*quid pro quo*' harassment"); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n. 3 (4th Cir.1995) ("[defendant] recognizes that in *quid pro quo* sexual harassment cases an employer is automatically liable for its supervisor's conduct"); *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir.1994) (Judge Reinhardt, with two judges concurring in result) ("Once quid pro quo sexual harassment has been established, the harasser's employer is, ipso facto, liable"); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.1992) ("Under a 'quid pro quo' theory of sexual harassment, an employer is held strictly liable for the conduct of supervisory employees having authority over hiring, advancement, dismissal, and discipline, under a theory of respondeat superior."); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir.1990) ("[A]n employer is strictly liable for the actions of its supervisors that amount to sexual discrimination or sexual harassment resulting in [a] tangible job detriment to the subordinate employee."); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir.1989) ("In a quid pro quo case, the corporate defendant is strictly liable for the supervisor's harassment.").

act also is much more detectable than harassment committed outside the employer's vantage point, or at least it will become more readily detected once employers understand that they are strictly liable for these acts. When a supervisor wishes to fire a subordinate, it will behoove the employer to know the reasons and ensure that they are valid and non-discriminatory. Although this probably will require more detailed procedures, it is a better result than monitoring the workplace as if it were a prison, searching for inappropriate behavior and earning the disgruntlement and dissatisfaction of employees in return.

These are the areas of general agreement. But as the length and the separate writings in this "opinion" demonstrate, many differences remain. Four major areas remaining in dispute merit some discussion.

I. Quid pro quo harassment and a supervisor's unfulfilled threats

As I noted above, the court has retained the distinction between quid pro quo harassment and hostile environment harassment. In addition, under both Judge Flaum's approach and Chief Judge Posner's approach, an employer is strictly liable for a supervisor's quid pro quo harassment. And because of that harsh standard of strict liability, it is important and necessary to keep the definitions clear and narrow. Quid pro quo harassment occurs when the submission to a superior's sexual demands is made a condition of tangible employment benefits. Before strict liability attaches, however, the plaintiff must meet a significant burden.

Quid pro quo harassment is a special case of sexual harassment. This means that the plaintiff must establish the basic gate-keeping requirements of a sexual harassment claim in order to state a quid pro quo claim (e.g., unwelcome sexual

advances motivated at least in part by the plaintiff's sex). However, in addition to these elements, the plaintiff must establish (1) an ultimatum or *strong* suggestion on the part of a supervisor that failure to comply with a sexual demand will cause an employment detriment; and (2) that when she refused to comply with the demand, the supervisor imposed upon her a tangible job detriment.

These two additional elements are necessary because they distinguish quid pro quo claims from hostile environment claims. The first element—an ultimatum on the part of the supervisor—may be either explicit or implicit. An example of an explicit demand is a supervisor who tells an employee she will be fired if she refuses to have sex with him. (This assumes, of course, that he has the power to unilaterally fire her.) But most cases fall into the "implicit" category, such as the supervisor who discusses the employee's job performance (and performance review) at the same time he broaches the subject of sexual favors. The closer the nexus between the discussion of the review and the sexual advance, the more likely the case involves actionable quid pro quo harassment. (This again assumes the supervisor's review has a dispositive effect on the subordinate's job.) But there is a dangerous trend to stretch the boundaries of this element so that any harassment by a supervisor who has authority to influence raises, leaves of absences, or other job benefits is quid pro quo harassment. Proof that the harassment is by a supervisor (who often has plenary power over the employee-plaintiff) is a necessary, but not a sufficient condition to establishing a quid pro quo claim. The plaintiff also must offer evidence that the supervisor, through his words or conduct, *actually conditioned* the employee's receipt of the benefits on his receiving sexual favors. Typically this occurs only when the supervisor is discussing job benefits with an employee *at the same time* he is discussing the sexual favors with her.

The second element of a quid pro quo case (that the plaintiff suffered a tangible job detriment as a result of not submitting to the advances) is equally important if we are going to impose strict liability in these cases. Sexual harassment is a tort, and strict liability is not imposed on tortious conduct except in rare circumstances, such as inherently dangerous activities requiring great care on the actor's part. (See Coffey concurrence, *ante* at 89.) Where those activities result in danger but not in damage, no liability exists. So too with quid pro quo sexual harassment. If the plaintiff has suffered no tangible job detriment as a result of not submitting to a sexual demand (*e.g.*, she has called the supervisor's bluff), then the tort is incomplete and no cause of action can lie. While it is true that the adverse employment action (or tangible job detriment) may vary in form from case to case—a demotion in one case, a loss of title in another, *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir.1996)—the job detriment must be material and tangible.

A threat without negative job consequences cannot support a quid pro quo claim. An employee who either has succumbed to her supervisor's sexual advance or has called her supervisor's bluff has suffered no tangible job detriment. In either case, absent a complaint by the employee, the company is in the dark. Even more so with belated claims of resulting psychological or emotional distress. Strict liability for injuries known only to her and her doctor is clearly unjust. Suppose the threat is "have sex with me or you're fired." Unless the employee complains, or refuses to have sex with the supervisor and thus is discharged, the company knows nothing. We can encourage companies to review discharges to make sure that they are legitimate (it would be unfortunate to require closer scrutiny when men fire women, but with this trend in the law it may come to that). But if in this example

the employee was not fired, there is no "company act" to review. We all agree that the purpose behind vicarious liability of any kind is deterrence. A standard of strict liability on the employer's part will not deter the making of threats any more effectively than a standard of negligence because the employer is helpless to prevent them in the first place. No one favoring strict liability for mere threats has suggested that a company surreptitiously monitor its supervisors' conversations with employees to prevent threatening statements from being made.

Threats cannot constitute quid pro quo harassment for the same reason they could not fall within the supervisor's scope of employment—they are not authorized, they do not carry the employer's imprimatur, they do not speak on behalf of the company. In Chief Judge Posner's parlance, they are "noncompany acts"; in Judge Coffey's, they constitute "attempted quid pro quo harassment." In either case, they are personal and the employer has no reason to know they were uttered. If we treated threats as company acts, thus implicating strict liability, then we would be saying that any supervisor, acting on his own, has the power to bind an employer to liability based on tort, while at the same time few among us would agree that he could so readily bind his employer to a contract. And because so many complaints of sexual harassment contain threatening comments, quid pro quo harassment and strict liability would become the typical case rather than the narrow exception it should be.

II. The Restatement (Second) of Agency

The Supreme Court did not elaborate when it instructed courts "to look to agency principles for guidance" in the area of employer liability for sexual harassment. *Meritor*, 477 U.S. at 72. We are left to determine exactly what "common-law agency principles" it intended. *Id.* While the *Restatement (Second) of Agency* might look like a logical starting place, its

usefulness is limited in cases such as this one. Issued almost forty years ago, nowhere does it mention sexual harassment; indeed, it predates Title VII. In fact, there is not much in the *Restatement* that makes any sense to apply to the sexual harassment context. The most applicable section probably is § 474, dealing with the so-called "fellow servant rule." But as Chief Judge Posner points out, applying that section to sexual harassment cases would be hopelessly confusing and formulaic. We would have to determine whether the harassing supervisor is a "vice principal" or a "superior servant." *See, e.g., Restatement* § 479. If the supervisor was classified as a superior servant, then another rule applies: "the master is not liable unless the superior servant's act is so close to that which he is authorized to do that it is within the scope of his employment." *Restatement* § 487, Comment *a*. This chain reaction is never-ending if we treat the *Restatement* as a surrogate statute.

Courts run into similar problems when trying to wring out a useable standard of employer liability from § 228 of the *Restatement*. That section contains a four-part test to determine whether conduct of a servant is within his scope of employment. I need not quote all of that section, for my colleagues do. It should be enough to quote § 228(2), which plainly states that "[c]onduct of a servant is not within the scope of employment if it is different from that authorized, far beyond the authorized time or space limits, *or too little actuated by a purpose to serve the master*." (Emphasis added.) Section 235 explicitly states that an "act of a servant is not within the scope of employment if it's done with no intention to perform it as a part of or incident to a service on account of which he is employed." Comment c could well be referring to an intentional tort such as sexual harassment in noting that "[t]he fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not

actuated by an intent to perform the employer's business."[3] That Comment also recognizes that in many cases the servant (supervisor) is "merely using the opportunity afforded by the circumstances to do the harm." This is precisely what a supervisor who sexually harasses is doing—taking advantage of his circumstances, such as his proximity to the employee and authority over her. It makes him an opportunist and his employer a victim of circumstances beyond its control.

Against this backdrop some of my colleagues conclude that a supervisor's sexual harassment may well fall within the scope of his employment. That would seem to be the rare case indeed, as other circuits have held. *See Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir.1997) ("sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business"); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir.1996) ("illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment"); *Gary v. Long*, 59 F.3d 1391, 1398 (D.C.Cir.1995) (harassing supervisor acts outside the scope of his employment in creating hostile environment, and employer is not liable where it has adopted policies and implemented measures condemning sexual harassment); *Bouton v. BMW of North Am., Inc.*, 29 F.3d 103, 107 (3rd Cir.1994) (sexual harassment is outside scope of employment and liability for supervisor's sexual harassment may only be imputed to employer where supervisor exercises actual or

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[3] We concluded as much in *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421-22 (7th Cir.1986), when we determined that an employer was liable ("only for those intentional wrongs of his employees that are committed in furtherance of the employment; the tortfeasing employee must think (however misguidedly) *that he is doing the employer's business in committing the wrong.*") (Emphasis added).

apparent authority; but plaintiff's belief that supervisor has apparent authority is unreasonable if the employer has a sexual harassment policy known to plaintiff).

My colleagues who embrace the *Restatement* and elevate it to the level of statutory force must accept the consequences as well. Under § 228, harassment only falls within the scope of a supervisor's employment if for some (inexplicable) reason, the supervisor believes that he is furthering the employer's business in the process. But more than this, the harassment also must approximate the type of conduct that the employer authorized, and obviously no reasonable employer would authorize such mistreatment of its own employees. Judge Wood believes that focusing on the conduct authorized by the employer is a "misstep," and that we should ask only whether the harassment occurred during the course of the employee's supervision. In other words, the issue would not be whether the tortious conduct creating the issue of liability was authorized, but whether it was performed by the supervisor *in the course* of his authorized activities. But if our reading of the *Restatement* is a misstep, then we are not alone, and the Supreme Court has stumbled too. *See Varity Corp. v. Howe*, 116 S.Ct. 1065, 1073, 134 L.Ed.2d 130 (1996) (citing Restatement's § 229(1) as "determining whether an activity is within the 'scope of . . . employment' in part by examining whether it is '*of the same general nature as that authorized*' ") (emphasis added).[4]

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[4] Judge Wood believes this interpretation is wrong because it effectively means sexual harassment could never be within the scope of a supervisor's employment—after all, no reasonable employer ever would authorize a supervisor to harass. Of course, this is why scope of employment and apparent authority theories are inapplicable in this context. As Chief Judge Posner explains, the solution is not to contort these theories until they appear to fit into this discussion, but to recognize that they have little to offer when it comes to a serious analysis of employer liability for sexual harassment.

III. "Apparent" authority

My third area of major disagreement concerns liability under a theory of so- called "apparent" authority. Apparent authority "is the power to affect the legal relations of another person by transactions with third persons, professedly as an agent for the other, arising from and in accordance with the other's manifestations to such third persons." *Restatement (Second) of Agency* § 8 (1957). Where a company publishes a policy against sexual harassment, as most employers do, there is no basis to support liability under a theory of "apparent" authority. This is in accord with the Court of Appeals for the Third Circuit, which has held that "[a] policy known to potential victims . . . eradicates apparent authority the harasser might otherwise possess." *Bouton v. BMW of North Am. Inc.*, 29 F.3d 107, 110 (3rd Cir.1994). Simply put, apparent authority must be based on an employee's reasonable belief that the agent (the supervisor) had authority, and no employee reasonably could believe that her supervisor was entitled to harass given a policy against such harassment.[5]

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[5] This position appears to be gaining support from other circuits. *See Torres v. Pisano*, 116 F.3d 625, 1997 WL 290196, at *7 n. 14 (2d Cir. June 3, 1997) ("Liability cannot attach on [the] grounds [of apparent authority] in the instant case, however, as it is undisputed that [the plaintiff] knew of [the defendant's] harassment policy and its availability."); *Harrison*, 112 F.3d at 1444 ("[The existence of apparent authority] will often hinge upon whether the employer has a formal policy against sexual harassment. When an employer lacks a formal written grievance policy, a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in the harassment or leaving her job. In contrast, if an employer has taken steps to remove any possible inference that a supervisor has authority to sexually harass his subordinates, the victim is likely aware the harassment is not authorized and *any reliance on apparent authority will be difficult to establish.*") (Internal quotation marks omitted) (Emphasis added). But it is not an altogether new understanding

Apparent authority is the square peg that doesn't fit into this round-hole discussion. The theory mostly applies to contracts between a stranger and an agent of the defendant (the principal). Where the principal has led the stranger to believe that the agent has the authority to make the contract, the principal is bound by it. So the stranger's reasonable belief must be based on some affirmative act done by the principal. *See Bourjaily v. United States*, 483 U.S. 171, 189, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) ("the agent's authority must be traced back to some act or statement by the alleged principal"); *see also Restatement* § 8 Comment *a* ("Apparent authority results from a manifestation by a person that another is his agent, the manifestation being made to a third person and not . . . to the agent."). Neither Jansen nor Ellerth contends that their employers informed them that their supervisors had the authority to sexually harass them. The facts demonstrate the opposite. For example, Ellerth concedes that Burlington had a policy *against* harassment and that she knew of it.[6]

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of apparent authority. *See Barnes v. Costle*, 561 F.2d 983, 996 (D.C.Cir.1977) ("[I]t could not be reasonably believed by an employee that the supervisor's [sexual] demands derived from the employer or that in complying with such demands the employee actually relied upon the authority of the employer.") (MacKinnon, concurring).

[6] I agree with Chief Judge Posner that an employee has a responsibility to complain about harassment, thus giving the employer an opportunity to remedy the situation before she files suit. Where she does not complain, and the employer has no reason to know of the harassment on its own, it would seem to be the rare case that the employer should be held liable under the law. And courts should not assume that employees who do not complain wanted to do so but were afraid: "[T]he law will not presume in every case that harassed members of Title VII's protected classes do not know what is best for themselves and cannot make reasonable decisions to delay—at least for a time—pursuing harassment claims, perhaps for privacy or emotional reasons, until they are ready to do so." *Torres v. Pisano*, 116

Some of my colleagues apparently believe that an employer may be liable so long as it approves of the supervisor's general supervision, rather than his specific act of harassment. For them it is enough that the employer's general grant of authority to the supervisor "enabled" him, or put him in a position, to commit an intentional tort. *See post* at 200 ("The one action [Antoni] took that was clearly unrelated to his supervisory position was his alleged vandalism of [Jansen's] car. No authority that PCA gave him *enabled him*, *helped him*, or affected his ability to take knife to tire.") (Judge Wood, concurring) (Emphasis added). Under that approach, an employer nearly always is liable because the powers it bestows upon a supervisor "enable" and "help" him to harass a subordinate. Apparently, the only requirement is that he be on the job when he commits the tort. It is the wrong approach because it altogether shifts focus away from the agent's activities, and imposes liability on the employer no matter how dissimilar the conduct is to the activities the employer actually authorized and communicated

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F.3d 625, 1997 WL 290196, at * 11 (2d Cir. June 3, 1997). As Chief Judge Posner notes, *ante* at 49-50, from a distance it is difficult to distinguish an office romance from a coerced or unwelcome alliance. An employer should not have to make that distinction. *See Barnes*, 561 F.2d at 999 ("The sexual advance of a supervisor toward an employee is seldom a public matter; and the distinction between invited, uninvited-but-welcome, offensive-but-tolerated and flatly rejected advances ordinarily does not fall within the special ability of the employer or higher supervisor to discern.") (MacKinnon, concurring). While an employer may discourage intra-office dating, especially between supervisors and subordinates, it should not have to inquire into a relationship to make sure it is "voluntary." The potential victim of a sexual demand should first say "no" and if the supervisor won't take no for an answer, then she must report the demand to someone higher up. Of course if the victim can show that the employer nevertheless should have known, liability would still attach, but because of negligence, not strict liability.

to the employees as authorized. In a nutshell, an intentional tort such as sexual harassment is so outrageous (by now everyone knows it's illegal) that it is hard to imagine a scenario where an employee reasonably believes her supervisor's job description includes the right to sexually harass her. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982) ("Under an apparent authority theory, '[l]iability is based upon the fact that . . . from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.' ") (quoting *Restatement* § 261, Comment *a*).

IV. Common v. Uncommon Law

If there is an unusual aspect to any of the separate approaches issued today, it is one suggesting that we should look to state common law to determine when and under what conditions an employer is vicariously liable for a supervisor's sexual harassment. Presumably this would mean that we often would be faced with a choice of law question. We might impose liability on an employer in one case, but not another though the facts of the two cases were the same. We would explain this disparate impact by saying that though we are a federal court applying the civil rights laws of the nation (here, Title VII), and though Congress surely intended all citizens to have equal rights under that federal statute, we think it best to allow the particulars of local interests to control federal court decisions.

The suggestion that we look to state law to resolve sensitive issues under the civil rights laws contradicts the general assumption that " 'in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.' " *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S.

30, 43, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989) (quoting *Jerome v. United States*, 318 U.S. 101, 104, 63 S.Ct. 483, 87 L.Ed. 640 (1943)). "One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application." *Id.* This is why in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), the United States Supreme Court rejected an argument that the term "employee" as used in the National Labor Relations Act (Wagner Act) should be defined by state law. It explained:

> Both the terms and purposes of the statute, as well as the legislative history, show that Congress had in mind no . . . patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is . . . intended to solve a national problem on a national scale. . . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.

322 U.S. at 123. Because the NLRA was the model for much of Title VII, *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 909, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), it follows that the reasons favoring a uniform national standard under the NLRA would support similar uniformity in our enforcement of Title VII. We should avoid the same "patchwork plan" of "varying local conceptions" governing civil rights laws that the Supreme Court sought to avoid under the NLRA. *See id.* ("[W]e have often observed that the NLRA was the model for Title VII's remedial provisions, and have found cases interpreting the former persuasive in construing the latter.").

Despite Congress' (and the Supreme Court's) seemingly clear preference that we favor a uniform national standard of employer liability rather than a 50-state standard wrapped in local common law, some of my colleagues would look to those local laws to determine when a supervisor acts within the "scope of his employment." But in interpreting the very same term under a different federal statute (the Copyright Act of 1976), the Supreme Court unequivocally (and unanimously) rejected that approach:

> In past cases of statutory interpretation, when we have concluded that Congress intended terms such as "employee," "employer," and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, *rather than on the law of any particular State, to give meaning to these terms*. . . . This practice reflects the fact that "federal statutes are generally intended to have uniform nationwide application." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989).

Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) (emphasis added). *Meritor* instructed us to look to "common law [agency] principles" to determine the scope of an employer's liability. Only three years later, *Reid* interpreted nearly identical language—the general "common law of agency"—as *ruling out* reliance "on the law of any particular State," which is exactly what some of my colleagues propose to do. For those who favor a 50-state standard of "scope of employment," *Reid* is seemingly insurmountable.

Finally, it is worth noting that already this year the Supreme Court has decided two cases of statutory interpretation under Title VII. *See Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (unanimously holding that the term

"employees," as used in the anti-retaliation provision of Title VII, includes former employees); *Walters v. Metropolitan Educ'l Enterprises, Inc.*, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997) (unanimously favoring payroll method to determine how many employees employer "has" on day in question). In neither case did the Court look to state law to inform its interpretation of Title VII terms.

Ultimately, the scope and purpose of Title VII resolve the issue as to whether state common law should prevail. The primary purpose of the Civil Rights Act of 1964 was to rid the workplace of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) ("The language of Title VII makes plain the purpose of Congress to ensure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."). I hardly think Congress intended to be successful only in so far as its efforts comported with state law. What happens when the Equal Employment Opportunity Commission, specifically empowered under 42 U.S.C. § 2000e-5 to enforce the provisions of Title VII by suing an employer on its own, files suit against an employer in federal court? Must the Commission turn to state law to support its claim of discrimination? It would seem odd that a federal agency's success in seeking the enforcement of a federal statute in federal court would depend upon state law.

Conclusion

Of all the approaches suggested by various members of the court today, given the present state of the law, Chief Judge Posner's approach would provide a consistent, uniform standard concerning when an employer is liable for a supervisor's sexual harassment. Where the supervisor commits a "company act," such as firing an employee who

refuses to have sex with him, the employer is strictly liable. But when a supervisor's sexual harassment has nothing to do with his position (though technically it occurs during the course of his workday), the standard of employer liability should be one of negligence. The issue becomes whether the employer knew or should have known of the harassment, what it could have done to prevent it, and, of course, what it did to remedy it. We need not muddy the playing field by asking whether the supervisor was acting within the scope of his employment because it would be difficult to envision a scenario where he was (see *supra*, Pt.II). But even if we were to ask such a question, it would make little sense to condition the answer on the law of any particular state. In banning state literacy tests by passing the Voting Rights Act Amendments of 1970, Congress recognized that discrimination was a "*national* dilemma that touche[d] every corner of our land," and further determined "the way to solve the problems of racial discrimination [was] to deal with nationwide discrimination with nationwide legislation." *Oregon v. Mitchell*, 400 U.S. 112, 133, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). The same could be said about Title VII. Its standards ought to be accessible and uniform; in other words, they ought to be common. For all of these reasons, I join the Chief Judge's opinion.

DIANE P. WOOD, *Circuit Judge*, joined by EASTERBROOK and ROVNER, *Circuit Judges*, concurring and dissenting. Today the *en banc* court establishes two propositions of great importance for all future claims of sexual harassment by a supervisor. First, a majority of judges agrees that both Kimberly Ellerth and Alice Jansen properly preserved all aspects of their claims of sexual harassment in their EEOC filings and district court complaints. (In addition to this opinion, see also opinions of Chief Judge Posner, Judge Flaum, and Judge Easterbrook.) Second, a majority of judges supports a rule under which employers will be liable when their supervisory employees, acting within the scope of their employment or their delegated authority, engage in "*quid pro quo*" sexual harassment. In keeping with the panel opinion in *Ellerth v. Burlington Industries, Inc.*, 102 F.3d 848 (7th Cir.1996) (Bauer, Rovner, and D. Wood), I analyze this as a problem of agency law, under which acts of "*quid pro quo*" harassment will almost always fall within the scope of the supervisor's employment and thus result in employer liability under a *respondeat superior* theory. Other members of the court have offered their own explanations. Judge Flaum concludes that employer liability is "automatic" once the plaintiff shows that the supervisor conditioned employment consequences upon the receipt of sexual favors by wielding the authority actually delegated to him, and Chief Judge Posner has shown why this is an efficient outcome.

The important point is that a majority of the court agrees on several fundamental propositions. A plaintiff must prove that (1) the harasser had supervisory authority over her or him, (2) the employer authorized the supervisor to confer the tangible employment benefit in question (*i.e.*, the "*quid*"), and (3) the supervisor demanded sexual favors as the price of that benefit. Furthermore, a majority of the *en banc* court agrees that the employer cannot escape liability in "*quid pro quo*"

cases merely by showing that it has a policy against sexual harassment. These are important developments in this circuit's sexual harassment law, which should not be overshadowed by our remaining differences.

Finally, a majority of the *en banc* court agrees that both Ellerth (if she did not waive the point) and Jansen brought forward enough evidence to survive summary judgment on their claims that their respective supervisors created hostile work environments through acts of sexual harassment.[1] (Whether Ellerth waived her right to rely on that theory is a separate question on which we disagree. I think not, for reasons I address in the final section of this opinion.) The majority has not, however, reached a consensus on the appropriate legal framework for this class of cases. In my view, the rules governing employer liability under Title VII for a supervisory employee's behavior do not depend on the kind of discriminatory or harassing conduct in which the supervisor has engaged; employer liability depends instead on whether the supervisor is acting within the scope of his authority, as I explain more fully below. I would therefore remand both cases for further proceedings.

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[1] The opinions of Chief Judge Posner, Judge Flaum, Judge Easterbrook, added to mine, lead to this result in Jansen's case. With respect to Ellerth's case, we must recall that the district court found that she had produced enough evidence to show a hostile environment; it rejected her claim on other grounds. Under this circuit's law, a district court's finding of a hostile environment is reviewed under the clearly erroneous standard if the court correctly stated the applicable law. See *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1269-70 (7th Cir.1991). As I understand their opinions, both Chief Judge Posner and Judge Flaum do not think that the district court clearly erred on this point; rather, they have concluded that Ellerth's reference to the Restatement (Second) of Agency in this court amounted to a waiver of the right to present a negligence theory.

The agency analysis I would use is consistent with any theory of discrimination that could be asserted under Title VII. Simply put, when a supervisory employee, acting within the scope of his authority as determined under the applicable state law, engages in discriminatory conduct, the employer should be liable under well recognized principles of *respondeat superior*, whether those acts are characterized for analytical purposes as "*quid pro quo*" demands, the infliction of a "hostile environment," or other discriminatory acts. The employer should also be liable when the supervisor acts within the scope of his apparent authority to take the employment actions in question: hiring, firing, assigning tasks, or controlling the workplace environment. Conversely, if the supervisor uses neither actual nor apparent authority to take the employment action, then the employer should be liable only if the plaintiff shows that the employer knew or should have known about the harassing behavior. This approach is consistent with both the statute and the Supreme Court's decisions in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), and *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). It gives the district courts the manageable task of deciding questions of scope of authority instead of imposing on them the impossible task of parsing a supervisor's every act to see if it belongs in the "*quid pro quo*" or the "hostile environment" category. Finally, it allows employers to contest the plaintiff's claim that the supervisor acted within the scope of his authority or abused his delegated authority. It therefore respects the Supreme Court's admonition in

Meritor not to impose "strict liability" on employers in this area.[2]

I

Before addressing the particular facts of the cases before us, it is useful to take a broader look at the legal principles that will govern them. Two fundamental issues arise. First, for purposes of employer liability, is there a principled distinction between "*quid pro quo*" and "hostile environment" claims? Second, under what circumstances will an employer be liable for the sexually harassing acts of its supervisory employees?

A. Forms of Sexual Harassment

Title VII prohibits discrimination on the basis of an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). In both *Meritor* and *Harris*, the Supreme Court recognized that sexual harassment is a form of sex discrimination. It also recognized that sexual harassment is not confined to actions of the "*quid pro quo*" variety, in which someone demands sexual favors in exchange for a tangible job benefit or the promise of such a benefit. Sexually harassing actions that create a "hostile work environment" also fall within the statutory prohibition of sex discrimination. Similarly, courts have recognized that

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[2] Some of my colleagues have chosen to characterize my approach as one that *de facto* creates "strict liability" for employers whose supervisory employees engage in acts of sexual harassment. I do not wish to engage in a debate over labels. In keeping with the Supreme Court's direction to "look to" agency principles in this area, I have outlined an approach that would impose *respondeat superior* liability in some instances and relieve the employer of such liability in others. This is not the "strict liability" that the Supreme Court rejected in *Meritor*, under which a plaintiff could hold an employer liable simply by proving the existence of the supervisory relationship.

discrimination based on race might take the form of a hostile work environment, see, *e.g.*, *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 673 (7th Cir.1993); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir.1991).

In the real world, sexual harassment does not sort itself into tidy categories. The same woman might be subject to both kinds of harassment from her supervisor at the very same time: he might repeatedly order her to his office, close the door, and stroke her leg, and on each occasion he might tell her that promotions will occur more readily if she has sex with him. The former conduct (made possible by the fact of his authority over her) would fall within the "hostile environment" category, but the latter would clearly be "*quid pro quo*" harassment. A rule making the employer strictly liable for part of this encounter, but liable only for negligence with respect to the other part, would make neither legal nor practical sense. This is because, unlike the example Chief Judge Posner suggests of the drunken worker who first injures a customer and later hits a pedestrian, in the harassment case the offending supervisor inflicts injury on a single victim, through a single act or course of conduct, and thus violates only one legal right. When this supervisor bombards an unwilling subordinate with unwanted sexual images, touching, vulgar words, or denigrating comments, only the most committed formalist would feel confident in saying when those actions cross the imaginary line from "hostile environment" harassment to "*quid pro quo*" harassment. By the same token, when the supervisor makes constant demands for sex in exchange for job benefits (maybe in jest, maybe not), the victim surely suffers from a "hostile environment" at the same time as she endures the "*quid pro quo*" harassment.

As Judge Flaum and those who have joined his opinion recognize, a supervisor is able to harass in a variety of ways:

he might attempt to use his supervisory authority to obtain sexual favors from a subordinate employee in a form of sexual blackmail; he might use his supervisory authority to create a "hostile environment" for the subordinate, requiring her presence while offensive language or behavior goes uncorrected or even encouraged; or he might offend in the same way as an obnoxious co-worker or stranger, in circumstances where the authority he wields in the company is irrelevant. The first two cases are both forms of sex discrimination made possible by the employer's delegation of authority to the supervisor; the third is harassment unrelated to the delegated authority. The critical question, for purposes of employer liability, turns on whether the supervisor has abused the powers the employer has entrusted to him; it does not turn on the way in which the supervisor has decided to abuse them.

A majority of this court would nonetheless make the employer's liability for a supervisor's actions depend on the artificial distinction between "*quid pro quo*" and "hostile environment" harassment. As the *per curiam* opinion reports, for actions that fall on the "*quid pro quo*" side of the line they would find the employer strictly liable, while for actions on the "hostile environment" side of the line they would find liability only if the employer was negligent. Such an approach relies on a line that will often be impossible to draw in supervisory harassment cases. Worse, it conflates two distinct inquiries: what counts as discrimination for purposes of Title VII, and when must the employer answer for it? There is nothing to justify the assumption that a supervisor's actions will be all one type or all another in each individual case; indeed, the facts of *Jansen* and *Ellerth* show that this is not likely to be true. If the statute itself spoke in terms of different types of sexual harassment and called for different liability rules, we would be bound to follow it and to do the

best we could. But the statute does no such thing. Nowhere does it suggest that the question of who speaks for the employer depends on the type of discrimination (sexual harassment, other sex discrimination, race discrimination, etc.) at issue.

One argument for superimposing such a distinction on the statutory language rests on the empirical assumption that employers' ability to monitor will vary depending on the type of harassment at issue. Chief Judge Posner has suggested (and I agree) that a strict liability rule would generally cause an employer to monitor the supervisor's behavior more closely. Nonetheless, he attempts to limit the force of this observation to the "*quid pro quo*" situation, postulating that (1) employers are better able to police the "*quid pro quo*" variety of harassment (on the assumption that multiple layers of bureaucratic review will constrain a supervisor's "*quid pro quo*" actions), (2) these same layers of review will be ineffective for hostile environment claims, and (3) most claims will be filed against large companies. Putting to one side the assumption that the normal Title VII defendant will have all the layers of review on which he relies, there is no reason to believe that employers have so few tools against supervisors whose discriminatory actions inflict a "hostile environment" on subordinates. It is worth recalling how unbearable the workplace must become in order to be "hostile" as to be actionable under Title VII. The Supreme Court defined a hostile work environment as one "permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris*, 510 U.S. at 21 (internal quotations and internal citation omitted). Compare *Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526, 533-35 (7th Cir.1993) (co-worker on different occasions rubbing leg, kissing, and leaping out at employee from behind a bush not

sufficiently severe or pervasive); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1353- 54 (7th Cir.1995) (fellow employee's taking victim to striptease bar, shouting for her to get up and perform, comparing her breasts to those of the dancers, and propositioning her would not have been enough, standing alone, for a claim).

Employers are quite capable of monitoring a supervisor's actions affecting the work environment without engaging in Orwellian surveillance. The alternative requirements for liability of sufficient severity or pervasiveness give focus to the employer's efforts to ensure that its supervisors are not engaged in blatantly harassing acts or an ongoing pattern of significant sexual harassment, or for that matter acts of racial discrimination, conventional sex discrimination, or a host of other undesirable behaviors. Nothing systematic makes this kind of severe or pervasive condition harder to detect than a single, clearly unacceptable, act of "*quid pro quo*" harassment, which could easily occur behind closed doors with only the supervisor and the victim as witnesses. The relative advantage the employer has over the courts in bringing about a harassment-free workplace does not vary depending on the type of harassment. In addition, making it clear that employers must answer for their supervisors acting within the scope of the authority delegated to them will increase the deterrent power of Title VII, by leading employers to improve their training and supervision of these employees.

Just as the statutory language and empirical considerations do not support investing the distinction between types of harassment with the weight most of my colleagues would give it, neither do the Supreme Court's decisions in this field. In *Meritor* the Supreme Court announced that the lower courts were to look to agency principles to determine when an employer would be liable for a supervisor's sexual

harassment. *Meritor* itself was argued as a hostile work environment case before the Court, but the record shows that the supervisor had actually engaged in both types of harassment. Notably, the Court did not distinguish between the two varieties of harassment when it came to discuss employer liability. Instead, it stated that:

> Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.
>
> For this reason, we hold that the Court of Appeals erred in concluding that employers are always *automatically* liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, *absence of notice to an employer does not necessarily insulate that employer from liability*.

477 U.S. at 72 (emphasis added). This passage is phrased entirely in terms of Title VII as a whole, indicating that the Court was not creating a rule specific to sexual harassment cases—let alone "hostile environment" sexual harassment cases—but was instead construing the entire statute to require reference to agency principles. In addition, the *Meritor* Court viewed agency principles as *limiting*, not expansive, factors in determining liability, as compared with the strict liability rule the lower court had adopted there.

It is true that Judge Flaum's approach more nearly accords with that of the Third, Sixth, Ninth, and Tenth Circuits, which have not questioned the legal basis of the distinction

between "*quid pro quo*" and "hostile environment" claims. That distinction is now some eighteen years old, dating from Catherine MacKinnon's pathbreaking book on *Sexual Harassment of Working Women*, published in 1979. Those courts, now joined by a majority of this court, have decided to make employer liability in this one area of Title VII law turn on the type of conduct at issue as well as the relationship between employer and employee.[3] See *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir.1994); *Bouton v. BMW of North America*, 29 F.3d 103, 106 (3d Cir.1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir.1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 183 (6th Cir.1992). In my view, however, those courts have not taken to heart the Supreme Court's admonition in *Meritor* to look to agency principles in Title VII cases. What they have called "strict liability" for "*quid pro quo*" cases is, in fact, nearly identical to the result produced by properly applied agency principles. As such, I have no quarrel with the results these courts have reached. In fact, *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.1994), and *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1536 (11th Cir.1997) (*en banc*), suggest that the Second and Eleventh Circuits have moved toward a uniform mode of analyzing employer liability for all sexual harassment. In *Faragher*, the Eleventh Circuit held that:

> an employer may be held indirectly, or vicariously, liable for hostile environment sexual harassment: (1) when a harasser is acting within the scope of his employment in perpetrating the harassment, see *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558 (11th Cir.1987)

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[3] It is regrettable indeed, and a commentary on the difficulty victims of sexual harassment have faced in having their claims taken seriously, that sex discrimination taking the form of harassment has been singled out for this uniquely disadvantageous treatment.

> (citing Restatement (Second) of Agency § 219(1)); and (2) when a harasser is acting outside the scope of his employment, but is aided in accomplishing the harassment by the existence of the agency relationship. *Sparks*, 830 F.2d at 1559-60 (citing Restatement (Second) of Agency § 219(d)).

111 F.3d at 1536 (footnotes omitted, parentheticals in original).[4] In *Sparks*, cited approvingly in *Faragher*, the plaintiff's sexual harassment claim was factually similar to Ellerth's.[5] In both *Faragher* and *Sparks*, the Eleventh Circuit relied on agency principles to assess the claims before it; it did not purport to impose "strict liability" on the employer.

B. Employer Liability for Supervisor's Actions

What, then, are the governing "agency principles" and where do we find them? As I indicate below, I agree with Judge Easterbrook that state law must furnish the rule of decision here, but even if we were creating a new federal common law of agency, it would be necessary to ground those rules in something. Chief Judge Posner has launched a broadside attack on the Restatement (Second) of Agency, noting that it is not a statute and need not be treated as "The Way." Few would disagree with that proposition. The Restatement nevertheless stands as a useful reference point for the common law of agency, and its principles have been

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[4] The majority of the *Faragher* court took a narrow approach to the question of scope of employment and ordered the dismissal of the plaintiffs' claims, while the dissents of Judge Barkett and Judge Anderson took an approach more in line with mine.

[5] Sparks' supervisor had called her into his office to ask if she was married and if she could become pregnant, subjected her to unwelcome touching, and told her things like "you'd better be nice to me," and "your fate is in my hands."

adopted by many state and federal courts as they have engaged in the very common law process he describes. See, *e.g.*, *Haddon v. United States*, 68 F.3d 1420, 1423-24 (D.C.Cir.1995); *Lehman v. Toys 'R' Us, Inc.*, 132 N.J. 587, 626 A.2d 445, 461-64 (N.J.1993); *Hinshaw v. Board of Comm'rs of Jay County*, 611 N.E.2d 637, 640 (Ind.1993); *Olson v. Connorly*, 156 Wis.2d 488, 457 N.W.2d 479, 483-84 (Wis.1990); *Deal v. Byford*, 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267, 272-73 (Ill.1989).

I see no reason to disregard the accumulated body of agency law that accepts the Restatement's propositions, any more than I would disregard state law developments that move beyond it. We owe respect to all of the varying sources of agency law to which the Supreme Court directed our attention in *Meritor*. The harder question, as Judge Easterbrook has pointed out, is to ascertain *which* body of agency law governs our interpretation of 42 U.S.C. § 2000e(b) (making employers liable for acts of their "agents," see *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir.1986)):(1) a new federal common law of agency, applicable only to sexual harassment cases and invented out of whole cloth; (2) a federal common law of agency that borrows its rules from the appropriate state law; or (3) state law directly. As Judge Easterbrook has argued at greater length, the first of these options is inappropriate in light of the Supreme Court's recent reiteration of the rule that state law should be incorporated as the federal rule of decision (when a statute is silent) in the absence of a significant conflict with, or threat to, a national interest. See *Atherton v. FDIC*, 117 S.Ct. 666, 673, 136 L.Ed.2d 656 (1997); see also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). It is hard to see how the need for national uniformity is any greater for the definition of the term "agent" in Title VII than it is in many other areas where federal courts

routinely turn to state law for underlying property and contract rules. For example, the tax and bankruptcy laws—matters of intense national interest—rely on state laws to determine whether property rights have been created and the extent of those rights. See *United States v. National Bank of Commerce*, 472 U.S. 713, 722, 105 S.Ct. 2919, 86 L.Ed.2d 565 (1985) ("[I]n the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property"); *Butner v. United States*, 440 U.S. 48, 54 & n. 9, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) ("Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different States.") State laws also determine if a state employee serves "at will" or not in § 1983 cases, see *Border v. Crystal Lake*, 75 F.3d 270, 273 (7th Cir.1996); and federal courts use state statutes of limitations for cases under 42 U.S.C. §§ 1981 and 1983. See, *e.g.*, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); *Robertson v. Wegmann*, 436 U.S. 584, 590-91, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). See also the examples cited in Judge Easterbrook's opinion at 141-42.

I agree with Judge Easterbrook that the law governing the question who is an agent of an employer for Title VII purposes must be, under these cases, state law. To his discussion, I add only two observations. First, the administrative consequences of his point about "vertical" uniformity should not be underestimated. The existence of side-by-side, but inconsistent, federal and state rules on employer responsibilities for acts of their supervisory agents will make it exceedingly difficult for employers in Illinois, Indiana, and Wisconsin (not to mention other states) to establish a single coherent management structure. Second,

the majority's rejection of *respondeat superior* liability for supervisory "hostile environment" cases means that the same woman who under state law will be able to hold her employer liable for a supervisor's violation of state civil rights statutes or for state torts will find her way to federal court barred. Victims of sexual harassment should be aware that the majority's approach has made them second-class citizens, both vis—vis their counterparts with state law claims and vis—vis other Title VII plaintiffs.

The law of agency, as the Supreme Court recognized in *Meritor*, is best suited to provide the answer to the question of when the employer must answer for the supervisor's actions, no matter what the supervisor's behavior. For present purposes, I discuss agency principles generally rather than undertaking a specific examination of Illinois's rules, both because I have no reason to believe that Illinois is an outlier on these matters and because in my view a detailed examination of Illinois's rules would be better performed in light of a more complete record. As reflected in Restatement § 219, agency law typically draws a fundamental distinction between acts within the scope of an agent's employment and acts outside the scope of employment. An initial question before us today is how, if at all, that structure applies to the relationship between a supervisory employee of a principal (the employer) and a subordinate employee of the same principal. A second preliminary question is whether this analysis operates differently in Title VII cases from the way it normally applies for other torts. When one considers the tripartite relationship among employer, supervisor, and subordinate employee, fully taking into account the responsibilities each has, the ability of each to take corrective action, and the incentive each has to act, the conclusions are inescapable that (a) general principles of traditional agency law provide a suitable analytical structure, and (b) nothing in

the law of discrimination requires modification of this analysis.

The key relationship for the cases before us is the one between the employer and the supervisory employee, for the simple reason that the question is whether the employer should be liable for the supervisor's actions. Under established principles of law, the relationship between employer and supervisory employee is plainly that of principal to agent. See *Moy v. County of Cook*, 159 Ill.2d 519, 203 Ill.Dec. 776, 640 N.E.2d 926, 927 (Ill.1994); *Kansallis Finance Ltd. v. Fern*, 421 Mass. 659, 659 N.E.2d 731, 733-34 (Mass.1996); *Ruiz v. Conoco*, 868 S.W.2d 752, 762-64 (Tex.1994); *Western Elec. Co. v. Brenner*, 41 N.Y.2d 291, 392 N.Y.S.2d 409, 360 N.E.2d 1091, 1094 (N.Y.1977); Restatement (Second) of Agency § 218. In old- fashioned agency parlance, the employer is the "master" and the supervisory employee is the "servant." However denominated, the agency relationship exists for functional reasons: the employer hired the supervisory employee to perform specified tasks for the employer, and the employer controls or has the right to control the supervisor's conduct in performing these tasks. See *Leon v. Caterpillar Indus., Inc.*, 69 F.3d 1326, 1333 (7th Cir.1995); *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir.1992); *Valenti v. Qualex, Inc.*, 970 F.2d 363, 368 (7th Cir.1992); *Central States Trucking Co. v. J.R. Simplot Co.*, 965 F.2d 431, 433 (7th Cir.1992). Occasionally the question arises whether the "control" element is weak enough that the agent should be characterized as an independent contractor, see *Kittlaus v. United States*, 41 F.3d 327, 330 (7th Cir.1994), but that is plainly not an issue in these cases, and will virtually never be an issue in the modern business firm where the employee receives a salary for her services.

It is important to bear in mind that Title VII itself applies to all but the smallest business enterprises in our economy. Thus, when we consider the principal/agent relationship between employer and supervisor, we may be speaking of anything from a 692,800-employee company like General Motors, see Hoover's Handbook of American Business, vol. 1, at 659 (1996), with countless layers of management between the CEO and the line employees, to a firm that barely meets the jurisdictional minima required for Title VII. *Cf. Walters v. Metropolitan Educational Enterprises*, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997) (describing how to compute whether an employer has 15 employees over a 20-week period annually, as required by 42 U.S.C. § 2000e(b)). Our approach must therefore be flexible enough to cover the incredible diversity of employers that fall within the ambit of the statute.

How, if at all, should the employer's responsibility for the supervisor's actions be affected if the victim of the supervisor's conduct happens also to be employed by the firm and under the supervisor's control? The employer's knowledge that one employee is under the supervision of another (to the extent dictated by the employer's own policies) certainly makes injury from the supervisor to the subordinate more foreseeable to the employer than injury to a stranger. That only underscores the importance of placing the responsibility on the employer to monitor the supervisor's job-related actions to ensure that he is not abusing the powers entrusted to him. Rather than assuming that subordinate employees have better access than, say, customers to a firm's internal mechanism for resolving discrimination complaints (although even that notion is questionable, since well-run companies normally offer complaint avenues for their customers) we should ask what job-related harm is foreseeable and who is in the best position to prevent it.

Typically, we distinguish between persons who are able to contract around potential injury from a transaction and those who are strangers. On that basis, the subordinate employee stands in a position much closer to the stranger, since no amount of contracting can prevent her from becoming the victim of a supervisor's sexual harassment. See Alan O. Sykes, The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines, 101 Harv. L.Rev. 563 (1988); Alan O. Sykes, The Economics of Vicarious Liability, 93 Yale L.J. 1231 (1984). Even the common law "fellow servant" rule did not bar recovery against the employer when the injury occurred at the hands of a "vice-principal," who could be anyone to whom the master had delegated his common law duties. See Prosser and Keeton on Torts, § 80, at 572 (5th ed.1984). By analogy, the subordinate suffers injury from a "vice- principal"—literally, one who stands in the place of the principal—when a supervisor harasses her.[6] Whether seen from the vantage point of foreseeability or in light of the turn-of-the-century "fellow servant" rule, employer liability follows.

If the injury flows from an intentional tort committed by the employee, such as the use of force or defamation, the employer will still be liable if the act was not unexpectable given the employee's duties. See, *e.g.*, *Deal*, 130 Ill.Dec. 200, 537 N.E.2d at 272-73 (apartment complex owner liable for apartment inspector's attack on tenant); *Aliota v.*

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[6] Some nominal supervisors may have authority that is limited enough that little if any of their harassing acts would fall within the scope of their authority or be aided by their supervisory position. In those cases, which may correspond roughly to the classic "superior servant" agency concept, the court would apply a negligence rule to any act that was outside the scope of authority.

Graham, 984 F.2d 1350, 1358-59 (3d Cir.1993) (employer can be liable for defamation); *Molton v. City of Cleveland*, 839 F.2d 240, 249 (6th Cir.1988) (city potentially liable because police officer's assault and battery were not unexpectable); *Rawling v. City of New Haven*, 206 Conn. 100, 537 A.2d 439, 443 (Conn.1988) (genuine fact question whether police officer was acting within the scope of his employment when he committed a sexual assault); *Daigle v. City of Portsmouth*, 129 N.H. 561, 534 A.2d 689, 700 (N.H.1987) (tortious or criminal character of officer's acts does not automatically remove them from scope of employment). See generally Restatement §§ 245, 247. These cases demonstrate that an intentional tort is not as a matter of law unforeseeable or outside the scope of employment. (I note as well that the injuries suffered by victims of sexual harassment can include both severe psychological harm and pecuniary injury from decreased productivity and loss of job opportunities. We should not trivialize the harm that harassment can inflict.)

Neither this court nor any other has had any trouble applying these agency principles to the various claims of discrimination apart from sexual harassment that are cognizable under Title VII and related laws. See, *e.g.*, *Hennessy*, *supra*, 69 F.3d 1344 (termination based on sex or pregnancy); *Balistrieri*, *supra*, 981 F.2d 916 (race discrimination in housing context); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518 (11th Cir.1992) (disparate pay based on gender); *Hunter*, *supra*, 797 F.2d 1417 (race discrimination); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir.1975) (hostile religious environment). Sexual harassment is no different and no harder to detect than other forms of discrimination. We know well that all forms of discrimination can be practiced subtly as well as blatantly. If an African-American employee charges racial

discrimination and wants to prove it by showing that her supervisor routinely used racial epithets when talking to her, she would face the same evidentiary problems as she would if the charge were either "hostile environment" or "*quid pro quo*" sexual harassment. Evidentiary concerns are appropriately addressed through the summary judgment process, not by engrafting liability standards onto the law that the language of the statute does not support.

Agency principles therefore apply in Title VII cases for purposes of deciding when an employer must answer for its supervisory employees' discriminatory acts to the same extent they do elsewhere. The first question in any case dealing with a supervisor's harassment should be whether the supervisor's action was within the scope of his employment. In order to answer that factual question, criteria like those suggested in Restatement (Second) §§ 228 and 229 are useful benchmarks. Section 228 is worth quoting in its entirety, as a useful summary of the concept of "scope of employment" and how it differs from the idea of "strict liability":

> (1) Conduct of a servant is within the scope of employment if, but only if:
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> (a) it is of the kind he is employed to perform;
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> (b) it occurs substantially within the authorized time and space limits;
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> (c) it is actuated, at least in part, by a purpose to serve the master; and
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> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

In section 230, the Restatement repeats the well recognized rule that "[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment." See *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1096 n. 12 (7th Cir.1992). See also *Aliota*, 984 F.2d at 1358; *Vlotho v. Hardin County*, 509 N.W.2d 350, 354 (Ia.1993); *Walker v. Crigler*, 976 F.2d 900, 904 n. 4 (4th Cir.1992); *Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282, 292 (Colo.1992) (*en banc*); *Ermert v. Hartford Ins. Co.*, 559 So.2d 467, 476-77 (La.1990); *Pyne v. Witmer*, 129 Ill.2d 351, 135 Ill.Dec. 557, 543 N.E.2d 1304, 1309 (Ill.1989); *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir.1987); *Simmons v. United States*, 805 F.2d 1363, 1369 (9th Cir.1986); *Dickenson v. Edwards*, 105 Wash.2d 457, 716 P.2d 814, 819 (Wash.1986) (*en banc*).

Contrary to Judge Flaum's suggestion in footnote 1 of his opinion, each of the four criteria described in § 228 imposes a meaningful limitation on the scope of employment, thereby ensuring that employers will not be held liable for the "frolics and detours" of their employees or for acts that are unforeseeable to the employer.[7] His criticisms of these criteria all focus so exclusively on the harassing behavior that they would exclude all "mixed motive" cases,

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[7] Indeed, the implication of his criticism here is that liability will be defeated in too many cases, because plaintiffs will have a hard time proving that harassing acts fall within the scope of employment, while at the same time the opinion argues that the approach I advocate would create liability that is too sweeping. Our job is not to find a rule that produces the "right" number of plaintiffs' or defendants' verdicts, however; it is to follow the law Congress has given us, interpreted as the Supreme Court has instructed. It is also worth recalling that any time the facts show that the supervisor has not acted within the scope of his employment, the plaintiff will still be free to try to prove employer negligence (which is the way most members of the court would treat "hostile environment" cases in any event).

notwithstanding the fact that agency law has always recognized this type of liability. The focal point must be the conduct the employer has hired the supervisor to perform. It is here that Burlington and Packaging Corporation take a misstep. They argue that courts must ask whether the supervisor was employed to commit the intentional tort of sexual harassment. All an employer has to do to prevail under their view—either to show the lack of actual authority or apparent authority—is to show that the supervisor was not employed for the purpose of engaging in sexual harassment. Merely to state this is to show what a preposterous standard it would be. We have already expressly held that "[a] principal cannot free itself of liability by delegating to an agent the duty not to discriminate." *Matchmaker Real Estate*, 982 F.2d at 1096. That principle applies with equal force here.

In my view, the proper inquiry on this point is whether the supervisor, acting at least in part with the purpose of serving the employer, committed the acts of harassment as he exercised the authority (actual or apparent) the employer conferred on him: hiring, firing, assigning work, disciplining other employees for harassing behavior, and the like. It may help to consider the authorized time and space limits to define which incidents were work-related, although in today's mobile world they are hardly conclusive. The question whether the supervisor's conduct is actuated, at least in part, by a purpose to serve the master is undoubtedly of central importance. Agency law has always made it clear that the employer is not liable for acts of the agent that exclusively serve the agent's personal interests, just as it has also made it clear that employers can be liable if the motives are mixed. The conduct of the supervisor that must be assessed is not the act of harassment in isolation, but instead his broader course of action. If the supervisor is engaged in his own business or is acting on his own time, then his acts will normally not be

within the scope of his employment unless he is acting with apparent authority. Finally, an intentional tort like sexual harassment plainly requires foreseeability. Some forms of sexual harassment are easily foreseeable, while other severe forms may be so far from the norm that the employer should not be held liable in the absence of negligence. In that connection, I believe that the Fourth Circuit may have gone too far in *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir.1995), in finding violent rape to be something undertaken at least in part with the employer's interests in mind, and thus something foreseeable to the employer.

If a court determines that a supervisor was acting within the scope of his employment or abused his supervisory authority, then employer liability follows under the well-recognized principles of agency law noted above. If the court finds to the contrary, then it must consider whether the employer is liable under any other theory. Two possibilities exist. If the employer was negligent in addressing the sexual harassment, then every member of this court agrees liability follows. See, *e.g.*, *Zimmerman v. Cook County Sheriff's Dept.*, 96 F.3d 1017, 1018 (7th Cir.1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir.1995); *Carr v. Allison Gas Turbine Div. Gen. Motors*, 32 F.3d 1007, 1012 (7th Cir.1994) (Coffey, J., dissenting on other grounds). (I fear that employers may be baffled by the "heightened duty of care" that Judge Flaum would impose under the rubric of negligence for hostile environment cases involving supervisors: does this mean closer monitoring? a more flexible notice requirement? a duty to take more extensive preventive measures? If this becomes the law of the Circuit, I predict a considerable period of uncertainty while we answer these and similar questions.) Alternatively, as I have already noted, if the supervisor had apparent authority to take the employment actions at issue—again, not apparent authority to

harass (which is impossible), but apparent authority to hire, assign, supervise, etc.—and no other limitation derived from agency law applies, then liability should result. Apparent authority is just the shadow of actual authority; it exists when third parties reasonably believe the principal gave the agent authority to conduct his affairs, even if no such agreement exists. (This means that the employer can take steps to negate the appearance of authority. Such steps might well show that the employee's belief in the supervisor's alleged power to promote or to fire, for example, would be unreasonable.) The existence of a policy against sexual harassment does not change this result, although it both can and should reduce the incidence of harassment and provide a mechanism for amicably resolving many claims.

No matter what the basis for employer liability, I do not disagree that a strong, credibly enforced policy against sexual harassment can affect a plaintiff's case at the damages stage. This is a highly fact-specific inquiry, however, which would arise only if a trier of fact found that liability existed for sexual harassment. It therefore has little bearing on the case before us today.

II

Proper application of the principles I have described requires an appreciation of the facts of the two cases before us. Both appeals come to us from grants of summary judgment on behalf of the respective employers. The following accounts of the facts are therefore taken in the light most favorable to the plaintiffs.

A. *Jansen v. Packaging Corporation of America*

Alice Jansen's experience as Al Antoni's secretary at the Tooling Services Department of Packaging Corporation of America (PCA) was not a happy one. Jansen was hired on August 2, 1991, to work for Antoni. As her supervisor,

Antoni was responsible for evaluating Jansen's performance (which determined her raises) and providing input into her hiring and firing. Antoni's objectionable behavior ran the gamut from sexually suggestive remarks and unwanted touching to the delay of tangible job benefits (and the threat of further "*quid pro quo*" actions). At work, he frequently asked Jansen what she thought about "quickies;" he told her there was time for a "quickie" while patting his crotch; he requested oral sex; and he bragged about his former secretary's willingness to give him "quickies." In September 1992, Antoni was responsible for completing a performance review of Jansen's work. Instead of returning the review promptly to the personnel department, Antoni held it back (along with Jansen's raise) for several months. Jansen made several inquiries about the review, to which Antoni responded by patting his crotch and saying, "I haven't forgotten about your review, it's on my desk."

In the end, Antoni gave her a "fully satisfactory" review and she received her raise, retroactive to September (although with no interest, as far as the record shows), but his harassing behavior did not stop. On January 19, 1993, Jansen filed a complaint about him, informing PCA's Human Resources Director, Paul Migala, that Antoni had made unwelcome sexual comments to her. Later the same day Migala and Hank Weil (Antoni's supervisor) met with Jansen to discuss her complaint. At that meeting, Jansen suggested contacting Sonja Marciciak to corroborate her allegations and noted that she had heard that Antoni's previous secretary, Vicki Krompton Wiley, had been subjected to the same kind of harassment. Jansen named two other employees who had sexual relationships with Antoni and gave Migala the informal log she had kept of Antoni's harassing actions. At the conclusion of the meeting, Migala assured Jansen that the company would investigate her claims thoroughly.

The investigation that ensued, however, was not what Jansen had in mind. It began with an interview of Antoni, who denied all of Jansen's allegations and accused her of inappropriate behavior. At that point, rather than following up with the names of people Jansen had provided, PCA interviewed nine other employees (including Marciciak). Marciciak confirmed that Antoni had once made an unwelcome sexual comment to her; that she had seen Vicki Wiley crying because of Antoni's comments about "blow jobs" and the like; and that Jansen had complained about Antoni to her. She could not directly corroborate any of the incidents with Jansen, however, for the simple reason that she had not seen them. The other people that PCA interviewed (in lieu of Jansen's suggested witnesses) were similarly unable to back up Jansen's story directly. The investigation also focused on Antoni's accusations about Jansen. Ultimately, Migala and Weil decided that the evidence of Antoni's sexual harassment was inconclusive. They passed that word along to Jansen in a meeting, and at the same time they told her that their investigation had uncovered some potentially improper conduct on her part as well. At that time, they gave Jansen a copy of the company's sexual harassment policy. They also counseled Antoni about sexual harassment, notwithstanding their "inconclusive" investigation.

This was not the first time PCA had heard complaints about Antoni's behavior. Tami Long had been Antoni's secretary before Wiley. Long testified that soon after she started work at PCA, in December 1987, Antoni began making crude and suggestive remarks to her, eventually asking her to engage in oral sex. At one point, PCA's director of personnel called Long into her office to discuss reports of Antoni's sexual harassment. Long complied, but asked the director not to launch a formal investigation into the charges. Instead, the

director "counseled" Antoni "without directly accusing him." The evidence also indicates that PCA knew that Wiley also had significant problems working for Antoni. Although she never complained directly to management about Antoni, Wiley told Migala when she left the company that it was "because of a personal conflict with Al Antoni," and that "another woman should not be put in that environment and have to go through what I did." Migala got the message. Following Wiley's resignation, Migala directly counseled Antoni (again) about sexual harassment. Jansen's complaint was thus at least the third time the company had heard about Antoni's proclivities.

After Jansen's complaint, Antoni began treating her differently. He took a "work to rule" approach to subjects like explaining her absence when she left her desk and made her the only secretary required to take her lunch break between 12:00 p.m. and 12:30 p.m. (the others could take their half-hour lunch breaks at their discretion). He stripped her of responsibilities such as answering his telephone calls and preparing the payroll, and took to locking his office, which made Jansen's job duties of delivering his mail and messages considerably more difficult. Although he restored the payroll duties when Jansen complained to Migala, Antoni delayed Jansen's performance review and her raise. Antoni also allegedly engaged in some "self-help" retaliation, slashing the tires of Jansen's car and wrapping her car antenna around her rearview mirror. Jansen ultimately filed a complaint with the EEOC claiming sexual harassment on February 26, 1993. In November 1993, the EEOC issued her right to sue letter, and she filed this suit on January 26, 1994, claiming sexual harassment and retaliation in violation of Title VII and raising several state law claims. Following discovery, the district court granted PCA's motion for summary judgment on all counts.

B. *Ellerth v. Burlington Industries*

Kimberly Ellerth first interviewed for a marketing job at Burlington Industries in March 1993. After her initial interview with Mary Strenk Fitzgerald, a National Accounts Manager in the Mattress Ticking Division, she was invited back to interview with Theodore Slowik, the Vice President of Sales and Marketing for that division. Ellerth found her meeting with Slowik disturbing because he asked her highly personal questions such as whether she and her husband were planning on having a family and "practicing" at it, and he stared conspicuously at her breasts and legs. About a week after the Slowik interview, Burlington offered Ellerth a job in which she would report to Fitzgerald, who in turn reported to Slowik. Ellerth accepted the position and joined Fitzgerald as the only other employee in the Chicago office.

Given the management structure, Ellerth was required to see and communicate with Slowik on a regular basis. On average, she saw him one or two days every month or two, either in Chicago, in New York, or at other corporate locations. She spoke with him on the telephone approximately once a week. These encounters, both verbal and direct, were characterized by a constant barrage of sexual comments, innuendo, and occasionally more explicit threats. Before one of Ellerth's trips to New York in the summer of 1993, Slowik telephoned her and spoke suggestively to her. Once she got to New York, at least two offensive incidents occurred. First, Slowik told Ellerth a number of off-color, offensive "jokes" during a meeting in his office. Second, at a business lunch with Ellerth and Angelo Brenna, Burlington's Vice President of International Sales, Slowik told a number of sexually offensive "jokes" and rubbed Ellerth's knee under the table. She pulled her leg away when he touched it. As the three left the restaurant, Slowik walked several feet behind Ellerth with Brenna, commented "You have got great legs, Kim," and

then asked Brenna what he thought. Ellerth complained about Slowik's behavior to two other Burlington employees as soon as she returned to the office.

Slowik continued making sexually offensive comments to Ellerth, both about her and about other women. These encounters were all in conjunction with business meetings. After one business dinner in Greensboro, North Carolina, Burlington's corporate headquarters, Slowik invited Ellerth to join him at the lounge of the hotel where they were both staying and she felt obliged to accept. While there, Slowik commented that the female band members had nice breasts, nice legs, and nice, skimpy outfits. Looking at Ellerth's breasts, he then said, "You are a little lacking in that area, aren't you, Kim?" When she did not respond, Slowik told her that she "ought to loosen up," and then, more threateningly, he said, "You know, Kim, I could make your job very hard or very easy at Burlington." Ellerth understood this to mean that she would have to have sex with Slowik to succeed at the company.

After the Greensboro trip, Slowik's telephone calls increased in number. Although they were brief, they normally included sexually harassing comments. Slowik would talk about Ellerth's body (particularly her legs) and would ask about her "practice" to have a family. On several occasions, Slowik refused to give her special permission to do things for customers until she described her clothing to him. He directly stated that her job would be much easier if she wore shorter skirts. On another occasion, he made comments in front of another employee that implied that Ellerth had been performing fellatio on him.

In addition to the harassing comments, Slowik repeated his unwanted touching of Ellerth on at least two occasions. He patted her rear at the annual company holiday party, and rubbed her knee during an interview for a promotion to the

position of Sales Representative for the Midwest territory while asking her whether the frequent travel associated with the new position would make her husband miss her. After the interview, the previous Midwest sales representative told Ellerth that Slowik (who had final decisionmaking responsibility for the promotion) was reluctant to promote her because she was "arrogant." Patrick Lawrence, who was also involved in the interviews and also reported to Slowik, confirmed that comment. When Ellerth confronted Slowik with this information, he admitted calling her arrogant and told her he was hesitant to promote her. Ellerth asked, "[I]s it because I'm not loose enough for you, Ted?," and Slowik replied in the affirmative. Nevertheless, two weeks later Slowik called to tell Ellerth that she had received the promotion, although he could not resist adding a sexually inappropriate comment at the end of the conversation that reduced Ellerth to tears.

Burlington's employee handbook included a brief statement that "[t]he company will not tolerate any form of sexual harassment in the workplace. . . . If you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk to your supervisor or human resources representative or use the grievance procedure promptly." In the next paragraph of the "Employee Relations" section, Burlington's handbook maintained that it had an "Open Door Policy":

> Burlington's Open Door Policy means just what it says—management's door is always open to you whenever you have ideas, suggestions or concerns about work-related matters. Most often, you will want to speak with your supervisor first. But if you feel more comfortable talking with your human resources manager or department manager, please don't hesitate to do so.

> They will do their best to answer your questions or help solve a problem.

Defendant's Appendix, Exh. F at 3. Although Ellerth did not talk either to Lawrence or the human resources manager, she did make her complaints known in several ways. First, of course, she had complained directly to Slowik himself, who certainly stood in a supervisory relationship to her. Second, in early 1994, she complained to Donna Thibideau, Burlington's Customer Service Manager, that Slowik was sexually harassing her. Thibideau told her that Slowik also may have harassed another Burlington employee. Finally, Ellerth complained to several other Burlington employees, including Sherry Hester, a Customer Service Representative, and Brett Schneider, a Sales Representative.

In May 1994, Ellerth and her new supervisor, Lawrence, met to discuss ways in which they could improve office procedures. At that time, Lawrence made no mention of customer complaints about Ellerth's own performance. Shortly thereafter, Lawrence and Thibideau received two such complaints, which prompted a May 22, 1994, memorandum from Lawrence cautioning Ellerth to be more careful about returning telephone calls. On May 31, 1994, Ellerth left a message on Lawrence's answering machine telling him that she was quitting. She faxed him a letter to the same effect. Three weeks later, she sent Lawrence a detailed explanation of her reasons for quitting, which informed him directly for the first time about Slowik's harassing behavior, including the unwanted touching and lecherous looks. She explained that both she and her husband had feared that her job would be jeopardized if she had complained any more about Slowik's actions than she had done. On October 12, 1994, Ellerth filed charges of sexual harassment with the Illinois Department of Human Resources (IDHR) and the Equal Employment Opportunity Commission

(EEOC). This suit followed after the EEOC sent its right to sue letter on November 30, 1994. As in Jansen's case, after some time for discovery the district court granted Burlington's motion for summary judgment on all counts.

C. *Pleading Issues*

Both PCA and Burlington raised an initial procedural objection to the plaintiff's ability to proceed on their "*quid pro quo*" theories at all. In Jansen's case, PCA claims that Jansen did not mention the factual basis for her "*quid pro quo*" claim in her EEOC complaint and thus that she should not be able to raise the claim now; it also argues that allegations about her "*quid pro quo*" claim were "utterly absent" from her complaint. Burlington similarly argues that Ellerth's Title VII complaint did not adequately give it notice that she was claiming "*quid pro quo*" harassment as well as "hostile environment" harassment. Neither PCA's nor Burlington's claims has merit even if we accept the distinction between "*quid pro quo*" and "hostile environment" harassment. Jansen's EEOC charge made it clear that she was complaining about harassment, and it was supported by her affidavit, which gave several specific examples of the harassing conduct. This suffices to show the kind of factual relationship between the conduct described in the EEOC charge and that raised in the lawsuit that our cases have required. See, *e.g.*, *Cheek v. Western and Southern Life Insurance Co.*, 31 F.3d 497, 500 (7th Cir.1994). Jansen's complaint also alleged facts sufficient to state a claim encompassing "*quid pro quo*" harassment under the liberal pleading standards of Fed.R.Civ.P. 8(a). See *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir.1996); *Bartholet v. Reushauer A.G.*, 953 F.2d 1073, 1078 (7th Cir.1992). Ellerth's EEOC charge and her Title VII complaint were similar. In the charge, she asserted that Slowik had sexually harassed her and that she had been "compelled to resign . . .

due to [the continued] hostile offensive and abusive work environment created by SLOWIK's harassment and my opposition to sexual harassment by SLOWIK." Her district court complaint alleged that she was "inappropriately touched and sexually harassed in her place of employment," and her brief in opposition to summary judgment argued that the harassment could be considered as the "*quid pro quo*" variety. Under my view, of course, both women's EEOC charges and complaints easily satisfy the burden of pleading that sex discrimination in the form of harassment occurred.

III

Under the standards outlined earlier in this opinion, both Jansen and Ellerth showed enough to survive summary judgment. Jansen's performance evaluation was held up for a significant period of time while her supervisor, Antoni (acting within the scope of his authority) both threatened her with an adverse job action if she did not have sex with him and imposed the immediate detriment of the delay when she refused to acquiesce. The threat was clearly enough to qualify as an adverse job action. The view espoused by a number of my colleagues that threats should never be enough to support liability, as a matter of law, would read out of the law all "*quid pro quo*" claims in which the victim acquiesces—a rule that would directly conflict with the Supreme Court's *Meritor*. See *Meritor*, 477 U.S. at 68. Furthermore, Jansen raised direct evidence of discrimination, see *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir.1994). The mere fact that a jury might choose to believe PCA's alternative explanation for the delay—that it was just a consequence of bureaucratic inertia—is of no importance on summary judgment, where we must draw inferences in Jansen's favor. From Jansen's perspective, the delay acted as a continuing demand for sexual favors, which caused its own injury, and it appears to have deprived her of at least the interest she would

have earned on a timely raise. See *In the Matter of Milwaukee Cheese Wisconsin, Inc.*, 112 F.3d 845, 849 (7th Cir.1997) ("[c]ompensation deferred is compensation reduced by the time value of money").[8]

Jansen also showed that Antoni harassed her in numerous other ways that fell within the scope of his authority. He was going about his business for PCA, taking advantage of his supervisory powers, while he badgered her, offensively pestering her for "blow jobs" and the like, and manipulating her work assignments based on her reactions to him. The one action he took that was clearly unrelated to his supervisory position was his alleged vandalism of her car. No authority that PCA gave him enabled him, helped him, or affected his ability to take knife to tire; Jansen's remedy here lies in the tort law of Illinois, not Title VII. For the record, although it is unnecessary for me to reach the point, I agree with those who believe that Jansen's complaints to the company, combined with its previous experience with Antoni, were enough to preserve her rights under a negligence theory.

Ellerth also brought forward enough to defeat summary judgment. Her evidence indicates that Slowik, acting within the scope of his authority (and, as some would put it, using his delegated authority), refused to give her special permission for work projects until she described her physical appearance to him. Interpreted in light of his earlier comment that he "could make [her] job very hard or very easy at Burlington," a jury could find that she had to play the role of sex object in order to obtain desirable work assignments (and

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[8] At this early stage of the litigation, it is immaterial that Jansen has not quantified the monetary damages she suffered; it is enough that she has shown the delay in receiving her raise and she has tied it to Antoni's harassing behavior. There is no rule in Title VII that a claim in which damages are small or nominal must be dismissed.

thus to advance in the company). The numerous incidents in which Slowik withheld permission for assignments until Ellerth satisfied his demands could, if believed by a factfinder, support a finding that harassment occurred.

Ellerth showed that Slowik, acting within the scope of his employment, poisoned the environment for her in other ways as well. As the district court conceded, the constant sexually suggestive remarks, the criticism of the size of her breasts, the importunements to be "looser," and the unwanted and uninvited touchings would have been enough to make work onerous for any woman. This court would look foolish indeed to the public at large if we appeared unable to distinguish between three friendly pats on the back and three acts of sexually oriented stroking. If a supervisor cannot tell the difference, he needs remedial counseling, not a free pass. No one wants to be a wet blanket on office romances, but the simple rule, reflected in every creditable sexual harassment policy in the country, is that unwanted touching is *verboten*. Would-be suitors in the office must just wait until their interest is reciprocated. Slowik knew that Ellerth did not welcome his advances, because she told him so. Obviously, there are two sides to this story, and the jury may not believe Ellerth in the end. But she is entitled on the facts she has shown thus far to try to persuade them that hers is the more credible account.

My conclusion that Slowik acted within the scope of his authority and abused his supervisory authority makes it unnecessary for me to reach the negligence issue. Those who are attempting to pigeonhole harassment cases have decided unfortunately that Ellerth waived this point by her statement disclaiming reliance on Restatement § 219(2)(b). I disagree. It is ironic that those who criticize undue reliance on the Restatement have seized on Ellerth's passing reference to its language as a way of finding that she waived the right to

support her hostile environment allegations on a negligence theory; one can reject the Restatement and still turn to the Title VII rules on negligence. Indeed, her brief stressed the point that she notified a number of individuals at Burlington about Slowik's harassing behavior, which would be relevant only if she thought Burlington's knowledge might be relevant under an alternative theory of liability. If negligence were the standard for her "hostile environment" claim, I would find that Ellerth is entitled to reach a jury on this theory. Even if a company has a policy against sexual harassment, as Burlington did (though a skimpy one as these things go), it cannot put on blinders and pretend that corporate "knowledge" comes only through that channel. I do not understand the other members of this court to argue otherwise; a plaintiff is entitled to prove that the employer "knew or should have known" about the offensive conduct in any way that she can. Use of a policy is a particularly easy way to satisfy this burden, but it is not the only one. Ellerth complained to a number of Burlington employees about Slowik, including most notably Donna Thibideau, Burlington's Customer Service Manager. Thibideau thought this may not have been the first time Slowik had behaved inappropriately. Ellerth is entitled to the opportunity to prove at trial that her informal communications were sufficient to put the company on notice of the problem.

For the reasons stated above, I would REVERSE the order of summary judgment and REMAND both No. 95-3128, *Jansen v. Packaging Corp.*, and No. 96- 1361, *Ellerth v. Burlington Industries*, for further proceedings.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Sixth Circuit

APPENDIX B

United States Court of Appeals
Seventh Circuit

No. 96-1361

KIMBERLY B. ELLERTH,

Plaintiff-Appellant,

v.

BURLINGTON INDUSTRIES, INC.,

Defendant-Appellee.

Argued Sept. 9, 1996.
Decided Nov. 27, 1996*

Rehearing and Rehearing En Banc Granted, and Decision Vacated Jan. 28, 1997**

Before BAUER, ROVNER, and DIANE P. WOOD, Circuit Judges. DIANE P. WOOD, Circuit Judge

Former employee sued her former employer for sex discrimination and constructive discharge under Title VII. The United States District Court for the Northern District of Illinois, Ruben Castillo, J., 912 F.Supp. 1101, entered

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* This opinion was originally released in typescript format.

** The Honorable Kenneth F. Ripple did not participate in the consideration of the suggestion for rehearing en banc.

summary judgment for former employer on ground that it was not responsible for supervisor's actions. Former employee appealed. The Court of Appeals, Diane P. Wood, Circuit Judge, held that: (1) complaint invoked *quid pro quo* theory of sexual harassment, and employee was thus entitled to have her allegations tested under that approach; (2) fact issues existed as to whether supervisor engaged in *quid pro quo* sexual harassment; (3) summary judgment evidence was sufficient to support finding that supervisor was acting within scope of employment when he allegedly sexually harassed employee; and (4) existence of policy forbidding sexual harassment did not alter any liability of employer under Restatement (Second) of Agency section providing for liability where servant purported to act on behalf of principal and there was reliance upon apparent authority, or servant was aided in accomplishing tort by existence of agency relation.

Reversed and remanded.

Kimberly Ellerth's lawsuit against Burlington Industries, which claimed that a higher level supervisor sexually harassed her, foundered on the rules for holding a company liable for its supervisory employees' conduct in this area. Expressing some frustration with the inadequacy of the theoretical framework available, the district court concluded that Burlington was not liable under any of the theories of agency law that Ellerth proffered. We agree with the district court that the rules governing supervisory liability in both *quid pro quo* and hostile work environment sexual harassment cases have been less than clear. Applying the agency principles that the Supreme Court instructed us to use in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), we conclude that Ellerth presented enough facts to survive summary judgment.

I

In March 1993, Ellerth interviewed for a marketing job at Burlington with Mary Strenk Fitzgerald, a National Accounts Manager in the Mattress Ticking Division. This conversation went well, and Ellerth was invited back for a second interview with Theodore Slowik, the Vice President of Sales and Marketing for the Mattress Ticking Division. From Ellerth's perspective, which we take on this appeal from an adverse grant of summary judgment, the initial encounter with Slowik was disturbing. Among other questions, he asked her if she and her husband were planning on having a family and "practicing" at it, and he stared conspicuously at her breasts and legs. About a week after this interview, Burlington offered and Ellerth accepted the position of Merchandising Assistant in its Chicago office. She reported to Fitzgerald, who in turn reported to Slowik. Fitzgerald and Ellerth were the only two employees in the Chicago office.

Given the management structure, Ellerth saw (and was required to see) Slowik on a regular basis. Although Slowik was based in New York, he came to the Chicago office one or two days every month or two. Occasionally Ellerth saw him in Greensboro, North Carolina, at Burlington's corporate office and manufacturing headquarters, or on training trips to New York and San Francisco. Even when she did not see him in person, her job caused her to speak with him on the telephone about once a week.

Ellerth's encounters with Slowik, both verbal and direct, were characterized by a constant barrage of sexual comments, innuendo, and occasionally more. In the summer of 1993, for example, she traveled to New York for a week of training. Before that trip, Slowik had telephoned Ellerth and spoken

suggestively to her. While there, she had several conversations with him, two of which were prolonged. The first of those took place in Slowik's office, during which he told Ellerth a number of off-color, offensive jokes. The second took place over a business lunch that included Ellerth, Slowik, and Angelo Brenna, Burlington's Vice President of International Sales. Slowik again told a number of sexually offensive jokes and rubbed Ellerth's knee under the table. She pulled her leg away when he touched it. When the three left the restaurant, Slowik and the other Vice President walked several feet behind Ellerth, and Slowik commented, "You have got great legs, Kim" and then, to Brenna, "What do you think, Angelo?" When they returned to the office, Ellerth reported to two other Burlington workers that Slowik and Brenna had been loud, obnoxious, rude, and offensive at the lunch.

Slowik continued making sexually offensive comments when Ellerth was with him, both about her and about other women. After a business dinner in Greensboro, Slowik invited Ellerth to join him at the lounge of the hotel where they were both staying, and she felt obliged to accept. At the lounge, Slowik commented that the female band members had nice breasts, nice legs, and nice, skimpy outfits. Looking at Ellerth's breasts, he then said, "You are a little lacking in that area, aren't you Kim?" When she did not respond, Slowik told her that she "ought to loosen up," and stared at her chest and legs. Upon leaving the lounge, Slowik's remark was more threatening: "You know, Kim, I could make your job very hard or very easy at Burlington." Ellerth interpreted this to mean that she would have to have sex with Slowik to succeed at the company.

After the Greensboro trip, Slowik began telephoning Ellerth more frequently. The calls, though brief, normally

included sexually harassing comments. Slowik would talk about her body (particularly her legs) and would ask about her "practice" to have a family. On several occasions, he refused to give Ellerth special permission to do something for a customer until she described her clothing to him. He suggested that her job would be much easier if she wore shorter skirts. Ellerth testified that "every time I was on the phone with him I ended up most—in tears." The same kind of conduct continued when he saw her personally. In the fall of 1993, on a visit to the Chicago office, Slowik encountered Ellerth on the floor where she was folding samples. In front of another employee, he said, "on your knees again, Kim," implying (falsely) that she would "again" perform fellatio.

Ellerth's resistance to Slowik's overtures did not deter him. In February and March 1994, Ellerth interviewed with Patrick Lawrence (who also reported to Slowik) and Slowik for a promotion to the position of Sales Representative for the Midwest territory. Slowik, who had final decisionmaking responsibility for the promotion, rubbed her knee with his hand during the interview for the promotion while asking her whether the frequent travel associated with the new position would make her husband miss her. Patrick Crosson, the person who had held that position previously, told Ellerth before her interview that Slowik had said he did not want to promote her because she was "arrogant." Lawrence reported the same thing. When Ellerth confronted Slowik about this, he admitted calling her arrogant and said, "I have my hesitations having you in this position." Ellerth asked, "[I]s it because I'm not loose enough for you, Ted?", and Slowik replied in the affirmative. Some two weeks later, Slowik called Ellerth to tell her she had received the promotion, but he added a sexually inappropriate comment to her at the end of the conversation that made her start crying.

In addition to Ellerth's complain[t]s about Slowik to the workers in the New York office, a[nd] to Vice President Brenna's direct observation of Slowik's behavior, Ellerth also complained in early 1994 to Donna T[hi]bideau, Burlington's Customer Service Manager, that S[lo]wik was sexually harassing her. Thibideau (who held a higher level position than Ellerth) told her that Slowik al[so] may have harassed Ann Pillow, another Burlington em[plo]yee. Ellerth also complained to Sherry Hester, a Customer Service Representative, to Brett Schneider, a Sales Representative, and to several customers. On at least one occasion between her hire date and the fall of 1993 she complained directly to Slowik about his behavior.

In May 1994, Ellerth and her new supervisor, Lawrence, met to discuss ways in which they could improve office procedures. Lawrence accepted some of Ellerth's suggestions; he made no mention of ar[y] customer complaints about her performance, including about her returning telephone calls. Shortly thereafter, L[a]wrence and Thibideau received one or two such complaints, [w]hich prompted a letter on May 22, 1994, from Lawrence to E[l]lerth about her failure to return calls from two customers and three Burlington employees. The letter referred t[o] a May 18, 1994, conversation between Lawrence and Ellerth, which Ellerth contends did not take place.

On May 31, 1994, Ellerth left a m[e]ssage on Lawrence's answering machine telling him that sh[e] was quitting, and she faxed him a letter to the same effect. The original letter that she wrote included references to Slow[i]k's harassment of her: "What I did not want to mention to yo[u] was the fact that Ted had harassed me in the past and I simp[l]y ignored him to save my job;" "[n]eedless to say these inc[i]dents could be seen as sexual harassment;" and "[w]hat a sh[a]me that one man can

have such an influence." At the advice of her husband, and knowing that Slowik was Lawrence's supervisor, she covered up those sentences with correction fluid before sending the fax, which she transmitted in a form that showed the blank spaces from the redaction. Three weeks later, she sent Lawrence a more complete explanation, in a letter dated June 21 that said in part:

> Before I was hired, you and I spoke about the reasons why Ted didn't feel comfortable around me. I told you he had said and done some sexually inappropriate things to me in the past. What I didn't tell you was that he had on two occasions, patted my rear and every time he saw me looked me up and down like a piece of meat. . ..

Although Ellerth knew that Burlington had a policy against sexual harassment, she was unaware of how vigorously it was enforced, and both she and her husband feared that her job would be jeopardized if she complained more than she already had.

Burlington's policy against sexual harassment was in force throughout the time Ellerth was employed there. It stated that "[t]he company will not tolerate any form of sexual harassment in the workplace. . .. If you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk to your supervisor or human resources representative or use the grievance procedure promptly." It is undisputed that Ellerth did not use the grievance procedure or complain to her direct supervisor (as opposed to Slowik himself).

II

On October 12, 1994, Ellerth filed a charge of sexual harassment with the Illinois Department of Human Rights (IDHR) and with the Equal Employment Opportunity Commission (EEOC). Her complaint alleged that:

> On numerous occasions, since in or about March 1993, I was sexually harassed by . . . TED SLOWIK. On several occasions, including on or about March 15, 1994, SLOWIK rubbed my knee in an offensive and unwelcome manner. SLOWIK also made numerous comments to me about my legs, breasts and physical appearance, including on or about May 1, 1994, when he told me I had great legs and should wear shorter skirts. SLOWIK also made a comment to me, on or about October 1, 1993, about me being on my knees "again."

She alleged as the latest date of discrimination May 30, 1994, which was when she felt "compelled to resign . . . due to continued the [sic] hostile offensive and abusive work environment created by SLOWIK's sexual harassment and my opposition to sexual harassment by SLOWIK." The EEOC issued a right to sue letter on November 30, 1994, and this suit followed.

Ellerth's complaint in the district court alleged both sex discrimination (in the form of sexual harassment) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and constructive discharge in violation of Title VII. See *Ellerth v. Burlington Indus.*, 912 F.Supp. 1101 (N.D.Ill.1996). Although the district court's opinion analyzed the case as one involving the "hostile work environment" variety of sexual harassment, the court noted that "imbedded

in Slowik's harassment of Ellerth is a *quid pro quo* proposition," referring to Slowik's threat "I could make life very hard for you." *Id.* at 1114. Nonetheless, the court thought the complaint's failure explicitly to allege the *quid pro quo* theory prevented it from using that theory as a ground of recovery. *Id.* at 1114-15 n. 10.

Burlington argued before the district court that Ellerth's complaint was untimely as to all conduct occurring before December 20, 1993, the date 300 days before she filed her complaints with the IDHR and the EEOC. Finding that Ellerth was aware of the discriminatory nature of Slowik's conduct from the outset, the district court agreed that "by the summer of 1993, Slowik's discriminatory conduct had the degree of permanence that should have triggered Ellerth's awareness of and duty to assert her rights." *Id.* at 1113. Nonetheless, the court found that evidence of pre-December 10, 1993, conduct was relevant to the consideration whether Ellerth was subjected to an actionable hostile work environment. In that light, it found that Ellerth had raised a genuine issue of material fact on the hostile work environment issue. The court specifically found that Slowik's March 1994 conduct, rubbing Ellerth's knee during the promotional interview, "could be regarded as reinforcing Slowik's previous persistent implicit messages to her that her value was as a sex object and that her growth in the company was dependent upon her sexual availability to him." *Id.* at 1114.

The critical issue in the case therefore became whether Burlington was liable for Slowik's conduct. The district court noted that *Meritor* requires courts to look to agency principles when evaluating whether employers should be held liable for sexual harassment by their supervisors. It first considered whether Slowik's harassment was committed

within the scope of his employment, as that term is used in the Restatement (2d) of Agency § 219(1) (1958). Looking at the factors listed in the Restatement (2d) § 228(1)(c) and at § 235, the court concluded that Slowik's conduct was not motivated to serve Burlington and thus that it could not be considered as falling within the scope of his employment. The court then turned to § 219(2), which sets forth various theories under which an employer might be liable for acts of its employees acting *outside* the scope of their employment. It found that Ellerth could not use § 219(2)(b), which applies where the employer was negligent or reckless, because her failure to use Burlington's sexual harassment remedies or to take other measures to notify Burlington meant that she could not show that Burlington knew or should have known about Slowik's conduct. The court held that Slowik's position as manager did not mean that his acts could automatically be imputed to Burlington. Finally, the court rejected liability under § 219(2)(d) of the Restatement, which subjects an employer to liability when the employee exercises apparent authority or is aided in accomplishing the tort by means of the agency relation. This language, it thought, reaches only conduct that on its face appears to be a natural and authorized incident of the agency. Here, Ellerth was aware that Slowik was exceeding his authority. Recharacterizing the case as a *quid pro quo* action or as constructive discharge was also unavailing for Ellerth. The district court therefore granted summary judgment for Burlington and dismissed all of Ellerth's claims.

III

Before this Court, Ellerth raises two principal claims: first, she asserts that her complaint (both before the EEOC and in the district court) was sufficiently broad to encompass the *quid pro quo* theory, and second, she argues that the

district court erred as a matter of law in its analysis of the agency principles applicable to her case. We address the procedural question first, and then consider the issue of supervisory liability under both theories of harassment.

A.

The district court construed Ellerth's complaint as one invoking only the hostile work environment theory of sexual harassment, although its opinion acknowledges that her allegations brought to mind *quid pro quo* harassment as well. On appeal, Burlington urges us to take the same approach. It portrays her *quid pro quo* theory as an afterthought, developed only in the course of discovery and not stressed until her briefs before this Court. Ellerth, for her part, argues that her complaint met the liberal standards of Fed.R.Civ.P. 8(a)(2) and that particularized pleading of sub-theories of sexual harassment (itself a subset of the sex discrimination prohibited by Title VII) is not required by the rule.

In our view, Ellerth has the better of this argument. Her charge with the EEOC alleged that Slowik had sexually harassed her and concluded with the complaint that she had been "compelled to resign . . . due to [the continued] hostile offensive and abusive work environment created by SLOWIK's harassment *and my opposition to sexual harassment by* SLOWIK." (Emphasis added.) Her complaint in the district court alleged simply that she was "inappropriately touched and sexually harassed in her place of employment." The distinction between hostile environment and *quid pro quo* sexual harassment is an analytical one, rather than one based on statutory language. Indeed, it would be a mistake to think that there is a bright line between the two kinds of situations, as Ellerth's own case illustrates. The same actions that create a hostile environment may have

overtones of *quid pro quo* demands, and a person suffering from *quid pro quo* harassment is also enduring a hostile environment. Whatever utility the distinction may have in the factual and legal development of a case, there is no requirement that EEOC charges or Title VII complaints plead the particular theory of harassment that the complainant wishes to pursue. See *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir.1996); *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir.1992). Ellerth's complaints, coupled with the supporting materials she submitted to the district court, brought forward the facts tending to show *quid pro quo* as well as hostile environment harassment, and the court's extensive discussion of the *quid pro quo* theory shows that it recognized its potential applicability. Ellerth was entitled to have her allegations tested under both approaches, both in the district court and here, on our *de novo* review of the district court's summary judgment ruling.

B.

As this Court recently noted in *Bryson v. Chicago State University*, 96 F.3d 912 (7th Cir.1996), *quid pro quo* harassment "occurs in situations where submission to sexual demands is made a condition of tangible employment benefits." *Id.* at 915. See also *Bristow v. Drake St. Inc.*, 41 F.3d 345, 353-54 (7th Cir.1994); *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 461 (7th Cir.1990); *King v. Board of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 539 (7th Cir.1990); *Saxton v. American Tel. and Tel. Co.*, 785 F.Supp. 760, 764 (N.D.Ill.1992), aff'd, 10 F.3d 526 (7th Cir.1993). The initial question for us is therefore whether Ellerth's allegations and the materials she presented in opposition to Burlington's motion for summary judgment raised a genuine issue of fact on her *quid pro quo* theory. We conclude that they did. On a number of occasions, this

evidence indicates that Slowik refused to give Ellerth special permission for work projects until she described her physical appearance to him. Interpreted in the light of his earlier comment that he "could make [her] job very hard or very easy at Burlington," a jury could find that she had to play the role of sex object in order to obtain desirable work assignments. The numerous incidents in which Slowik withheld permission for work assignments until she satisfied his demands could, if believed by a factfinder, support a finding that the harassment occurred. In addition, the district court found, and we agree, that Ellerth came forward with enough evidence to support a factual finding of hostile work environment.

C.

We therefore turn to the question which is central to both the *quid pro quo* claims and the hostile environment claims: whether Burlington is liable for Slowik's actions under the rules for employer liability established in *Meritor* and *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). In 1986, the Supreme Court confirmed in *Meritor* that sexual harassment is a form of sex discrimination prohibited by Title VII. After holding that actionable harassment could exist if it were sufficiently severe or pervasive to alter the conditions of employment, the Court turned to the question of the employer's liability for its supervisor's actions. As in our case, the employer in *Meritor* had not been given notice of the supervisor's alleged conduct. After discussing the parties' respective positions on the question, the Court commented that the debate had "a rather abstract quality about it given the state of the record in this case." 477 U.S. at 72, 106 S.Ct. at 2408. Rather than issuing a definitive rule on employer liability, the Court instead stated only that it agreed with the EEOC:

> that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, *absence of notice* to an employer does *not necessarily insulate* that employer from liability.

Id. (Emphasis added.) Importantly, the Court rejected the employer's argument that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the employee's] failure to invoke that procedure," insulated it from liability. *Id.* It concluded that the Court of Appeals had been wrong "to entirely disregard agency principles and impose *absolute* liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Id.* at 73, 106 S.Ct. at 2408 (emphasis added).

Meritor thus rejected both the extreme view that employers are "automatically" or "absolutely" liable for the actions of their supervisory personnel, and the extreme view that the mere existence of a grievance procedure and a policy against discrimination is enough to insulate the employer from liability. Notably, the Court phrased its discussion in terms of what Title VII required, implying that it was not creating a rule specific to sexual harassment cases but instead was construing the statute as a whole to require reference to

agency principles. We must decide, therefore, whether Ellerth presented enough to defeat summary judgment for Burlington on the ground that agency principles themselves show that it is not liable for Slowik's actions. This is the first occasion since *Meritor* that this court has been required to consider the problem of sexual harassment by supervisors in this light. We begin, as *Meritor* instructs, by consulting basic agency law.

D.

The Restatement (2d) of Agency, § 219 ("Second Restatement"), sets forth the general rules for when a master is liable for the torts of his servants. The rules of agency apply with equal force when the relationship is one of master and servant, because a servant is merely "an agent of a special kind, over whose physical acts the principal has control or the right to control." *Id.* § 25, cmt. a. Because it is critical to our analysis, it is worth setting forth the language of § 219 in full:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or

he was aided in accomplishing the tort by the existence of the agency relation.

The parties have focused most of their arguments on § 219(2)(d), to which we turn in time, but like the district court we begin with § 219(1), which holds the key to supervisory liability in many of these cases.

The critical question here, as in most agency cases, is the meaning of the phrase "acting in the scope of their employment." Few concepts have a longer history in the law of agency. Thus, for example, Justice Joseph Story wrote in his Commentaries on the Law of Agency (5th ed. 1857) ("Story on Agency") that a principal:

> is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.

Story on Agency, § 452, at 536-37. In these cases, Story explained, "the principal holds out his agent, as competent, and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency." *Id.* at 537. For matters outside the scope of the agency, Story wrote that the principal would not be liable unless he had expressly authorized the acts to be done, or he subsequently adopted them for his own use or benefit. *Id.* § 456, at 587. See also Floyd R. Mechem, The Law of Agency § 732, at 562 (1889) ("the agent's act is the act of the principal, and whatever injuries may result to third persons,

from the manner in which the act is performed, are properly attributable to the principal").

The English treatise on The Law of Master and Servant by Francis Raleigh Batt (J. Crossley Vaines ed. 1950) ("Batt on Master and Servant") throws some light on the traditional way of determining exactly what falls within the scope of employment. Batt wrote that "[a] master is liable for the wrongful act of his servant when it arises out of the performance of the servant's duties of service or when it is effected by the servant exercising the authority by which the contract of service endows him." *Id.* at 254. This excludes cases where the servant is engaged on business of his own and the wrongful act was unconnected with the master or his affairs. John W. Salmond's Treatise on the Law of Torts (1907) ("Salmond on Torts") is similar, stating that an act is done in the course of employment if it is either "(a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorized by the master." *Id.* § 29, at 83. Quoting from the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank*, (1867) L.R. 2 Ex. 259 at 266, Salmond noted that "[i]n all these cases . . . it may be said that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." Salmond on Torts at 84. Early Supreme Court cases reflect the same principles. See *Philadelphia and Reading R.R. Co. v. Derby*, 55 U.S. 468, 14 How. 468, 14 L.Ed. 502 (1852) (railroad company liable for train accident although conductor acted contrary to express instruction of dispatcher) (citing Story on Agency § 452 and others); *New Orleans, M. & C. Railroad*

Co. v. Hanning, 15 Wall. 649, 82 U.S. 649, 657, 21 L.Ed. 220 (1872) (railroad company liable for injuries caused by agent's negligent rebuilding of wharf) (citing Story on Agency § 452); *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 522-23, 10 S.Ct. 175, 176-77, 33 L.Ed. 440 (1889) (sewing machine company liable for carriage accident caused by employee driving wagon furnished by company and under exclusive contract with company).

Both the First Restatement of Agency (1933) and the Second Restatement carry forward these principles. In general, according to the Second Restatement § 228, conduct of a servant is within the scope of employment if and only if (a) it is of the kind he is employed to perform, (b) it occurs substantially within the authorized time and space limits, (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is "not unexpectable" by the master. Section 229 sets forth no less than ten factors that are helpful in determining whether or not conduct, "although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment." Second Restatement, § 229(2). Comment a explains that "[s]ince the phrase 'scope of employment,' is used for the purpose of determining the liability of the master for the conduct of servants, the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."

Reflecting no material change from the 19th-century authorities, the Second Restatement endorses the rule that the mere fact that an employer has forbidden his servant to do something, or to accomplish a task in a particular way, is not enough to defeat a finding that the act was within the scope of

employment. See *id.* § 230. This rule holds even if the employer has specifically forbidden the employee to do the act in question. Criminal or tortious acts can be found to be within the scope of employment, as § 231 describes at some length. Conduct is not for the purpose of serving a master only if it is done with no intention to perform it either as a part of, or incident to, a service for which the servant is employed. § 235. If the servant's motives are mixed, his actions may still be within the scope of his employment. § 235, cmt. b; § 236. The specific examples in the text of torts of the servant for which the master may be liable, such as liability for physical harm caused by the negligent conduct of the servant acting within the scope of employment (sec. 243), the use of force if it is predictable (sec. 245), and defamation (sec. 246), all are based on this general principle.

In all of these cases, the court focuses on whether the employer had the right to control the servant's actions at the time of the tortious occurrence, not on whether it expressly authorized the tort itself. It is plain that a principal would not instruct or authorize an agent to perform tasks negligently, or fraudulently, or in a manner harmful to others, but a finding that conduct was negligent, fraudulent, or harmful does not defeat a conclusion that it was within the scope of employment.

General agency cases help to illustrate the appropriate level of specificity in evaluating the scope of employment question. See, *e.g.*, *Standard Oil v. Parkinson*, 152 F. 681 (8th Cir.1907) (oil company liable for death of railroad engineer caused by driver negligently crossing railroad with company's wagon, oil and gasoline); *Metzler v. Layton*, 373 Ill. 88, 25 N.E.2d 60 (1939) (accidental shooting of coworker during bank robbery was so connected with other acts within scope of bank manager's employment that whether he acted

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Colby, 375 Ill. 558, 31 N.E.2d 95
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v. United States, 398 F.2d 167 (2d C

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itself is a transaction within the ordinary course of the business of the [employer], or within the scope of the [employee's] authority, but whether *the service itself in which the tortious act was done* was within the ordinary course of such business or within the scope of such authority." *Id.* at 1351 (emphasis added; quotation marks omitted).

In *Martin*, the supervisor's assaults (which included rape, oral and anal sodomy, and forced fellatio) took place in the workplace, during working hours, on an employee whom he had authority to hire, fire, promote, and discipline. There was no question that the assaults were foreseeable; otherwise the company would not have had a policy about sexual harassment in the employee manual. The court concluded that under common law agency principles, the supervisor was acting within the scope of his employment, and the company was answerable for his acts. *Id.* at 1352. In addition, the court found that the supervisor had both actual and apparent authority over the employee, which he used to accomplish the wrongful acts in question. Citing this court's decision in *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir.1986), the Fourth Circuit found that Cavalier Hotel was liable for its manager's actions.

This court came to a similar result in *United States v. Balistrieri*, 981 F.2d 916 (7th Cir.1992), a case alleging that the owner of an apartment building and his rental agent had committed discriminatory rental practices in violation of the Fair Housing Act, 42 U.S.C. §§ 3601-19. The owner argued there that even if the evidence was enough to show that the rental agent had discriminated, there was nothing to link her discrimination to him. In language pertinent to the case before us, the court held:

> In any event, Hurdelbrink was acting as Balistrieri's agent. Her duties as agent were to show apartments and to do the other things—such as quoting rents and stating rental conditions—that go along with that job. Hurdelbrink was acting within the scope of her authority—either actual or apparent—when she committed her discriminatory acts. As we have previously held, in housing discrimination cases, "a principal is liable for the wrongful acts of its agent." *Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir.1985); see also *Coates v. Bechtel*, 811 F.2d 1045, 1051 (7th Cir.1987). Therefore, Balistrieri is liable for Hurdelbrink's discrimination, even if he never expressly approved it.

981 F.2d at 930.

Applying these principles to the case before us, we conclude that the facts on the summary judgment record could support a finding that Slowik was acting within the scope of his employment with Burlington when he harassed Ellerth. As in *Martin*, most of his actions took place in the workplace, during working hours, and they were directed toward an employee over whom he had substantial authority. In some cases they occurred off-premises, but only in the context of business luncheons or work-related travel or—to quote *Martin*—"the service itself in which the tortious act was done was within the ordinary course of business or within the scope of such authority." 48 F.3d at 1351. Nothing ever happened on entirely personal time or circumstances. Slowik made the work environment hostile through the authority Burlington had given him to control Ellerth's work assignments and to influence (at the very least) her hiring and promotion, and his *quid pro quo* demands were (as they almost always will be) directly related to his corporate

position. The district court erred in believing that the relevant conduct was the harassment itself and that the harassment somehow needed to serve the employer's purpose before "scope of employment" liability could result. Construing the facts in the light most favorable to Ellerth, Slowik's supervision of Ellerth and the tasks she performed were plainly for Burlington's benefit; this is enough to make Burlington liable for his actions if he carried out those responsibilities in an improper manner.

Therefore, we arrive at much the same result as our sister circuits who have concluded that supervisory *quid pro quo* harassment can lead to employer liability, although our rationale differs in some important respects. See *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir.1994) (collecting cases); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 106-07 (3d Cir.1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), *cert. denied*, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.), *cert. denied*, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir.1989). We believe, in any event, that the term "strict liability" is not well suited to discrimination cases. Strict liability, after all, refers to a tort rule designed to encourage people to exercise greater care when undertaking socially beneficial but abnormally hazardous activities. See W. Page Keeton *et al.*, Prosser and Keeton on the Law of Torts § 75 at 537 (5th ed. 1984 & Supp.1988). Running a corporation may create the potential that employees discriminate on forbidden grounds, but this activity is not "abnormally" hazardous in the sense that blasting, making munitions, and disposing of toxic waste are. Rather, the high incidence of employer liability in *quid pro quo* cases can be explained by the very nature of the

harassment. Consistently with *Meritor*, employers are not liable in *quid pro quo* cases because the standard is "strict." Liability follows instead because *quid pro quo* harassment describes a set of facts where the supervisor, as agent, will almost always be acting within the scope of his delegated authority, and the tangible employment benefit that is the "quid" lies within the supervisor's power to give or withhold only because the employer, as principal, entrusted the supervisor with that particular power. As the Supreme Court put it in *Meritor*, referring to the EEOC's position:

> where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, *such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.*

477 U.S. at 70, 106 S.Ct. at 2407 (citing to amici briefs of the Solicitor General and EEOC) (emphasis added).

Thus, if and to the extent that Slowik engaged in acts of sexual harassment of either the *quid pro quo* or hostile environment variety, within the period covered by Ellerth's complaint, Burlington itself may be liable under the principles outlined here. (We note that Ellerth did not appeal the district court's determination on the statute of limitations point.) The fact that Ellerth did not invoke the remedies provided by Burlington's sexual harassment policy is not dispositive, as the Court held in *Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408. Under agency law, Burlington's liability for actions of its supervisor taken within the actual or apparent scope of his employment does not depend on whether someone else at the company knew or should have known

that Slowik was abusing the authority he had been given. The common law of agency places the responsibility on the employer to monitor the supervisory employees to whom it has entrusted special powers, to ensure that those powers are not misused.

E.

It is important to emphasize how the limiting principles found in the law of agency distinguish this outcome from the "automatic" or "absolute" theory of liability rejected by the *Meritor* Court. Because, on remand, some of those principles may also become relevant, we discuss them here. First and most important, the employer may succeed in showing that the supervisor's actions were taken outside the scope of his employment. (These might be actions taken entirely off the premises, where the meetings were not occasioned by the needs of the employer, or where the manner or type of abuse was entirely unforeseeable to the employer.) In that case, section 219(2) of the Second Restatement, set forth earlier, describes the much narrower circumstances under which a master may be liable for a servant's actions.

Subsection (a) of § 219(2) addresses the situation in which the master intended the conduct or consequences of the servant's actions. See Second Restatement § 212 (stating general rule that a person is subject to liability for the consequences of another's conduct which results from his directions if, with knowledge of the conditions, he intends the conduct or its consequences). In this circumstance, the question of "scope of employment" is basically beside the point, because the master has manifested a specific intent that the action occur.

Section 219(2)(b) makes the master liable for the servant's actions outside the scope of employment when the

master was negligent or reckless. See *id.* § 213. This theory frequently arises in sexual harassment cases, particularly where co-worker harassment is involved. For these cases, the question whether the employer knew or should have known about the harassing or other discriminatory conduct is central, because it goes to the basic issue of negligence or recklessness. See, *e.g.*, *Zimmerman v. Cook County Sheriff's Dept.*, 96 F.3d 1017, 1018 (7th Cir.1996) ("[t]he liability of an employer for sexual harassment by one nonsupervisory employee of another is not strict. The plaintiff must prove that the employer was negligent in having failed to discover and prevent it"). If negligence is the theory applicable to the case, then the question whether the plaintiff invoked a company's established sexual harassment policy or otherwise gave effective notice to the company is plainly relevant.

Section 219(2)(c) provides for liability for actions outside the scope of employment when the agent's conduct violated a non-delegable duty of the master. See also § 214. Such a duty might arise under a contract, or it might arise by operation of law. The Second Restatement gives several examples, including action that is illegal unless it is licensed, highly dangerous activities, and the special duties of occupiers of land. Although employers plainly have a duty under Title VII to operate a workplace free from discrimination, including sexual harassment, we do not read *Meritor* and *Harris* as holding that this duty is the special kind of non-delegable one referred to in § 214. This would, in effect, be the automatic liability rule that the *Meritor* Court rejected. But see Justin S. Weddle, "Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty To Prevent a Hostile Workplace," 95 Colum.L.Rev. 724 (1995).

Finally, § 219(2)(d) covers situations in which "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was

aided in accomplishing the tort by the existence of the agency relation." Our sister circuits have read this language two ways. In *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 108 (3d Cir.1994), the Third Circuit found that this language referred only to the apparent authority theory, albeit by phrasing it in two different ways. The Second Circuit took a different view in *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.1994), where it held employers absolutely liable under the first clause for sexual harassment enabled by apparent authority and under the second clause for sexual harassment enabled by delegated authority. Both Ellerth and the Equal Employment Opportunity Commission, as amicus curiae, urge us to follow the Second Circuit's approach here, while Burlington argues that the Third Circuit had it right.

In our view, the correct answer lies somewhere between the two. The first clause of § 219(2)(d) plainly implicates the well known apparent authority theory of agency law. Section 8 of the Second Restatement defines "apparent authority" as "the power to affect the legal relations of another person by transactions with third persons, *professedly* as agent for the other, arising from and in accordance with the *other's manifestations to such third persons*." (Emphasis added.) See also 2A C.J.S. Agency § 157a (1972) (apparent authority is "such power that a principal holds his agent out as possessing or permits him to exercise under such circumstances as to preclude a denial of its existence."). In *Faber-Musser Co. v. William E. Dee Clay Mfg. Co.*, 291 Ill. 240, 126 N.E. 186, 188 (1920), the Illinois Supreme Court defined apparent authority as the authority a reasonably prudent person would naturally suppose, or that which the agent appears to have by reason of his actual authority.

Under the first clause of § 219(2)(d), therefore, the principal will be liable where the agent misrepresented the

existence or scope of an agency relation, and it was reasonable under the rules of apparent authority for a third party to believe him. In such cases, the principal is held liable because of manifestations that made it reasonable for a third party to believe that the agent acted with authority. The issue of whether there was apparent authority does not arise on our facts at all. No one doubts that Slowik was a Vice President for Burlington, and thus that he was its agent in some respects.

Section 219(2)(d), clause 2, covers cases where the servant was aided in accomplishing the tort by the existence of the agency relation. On its face, this refers to the powers conferred by an agency relation, as opposed to "apparent authority" to act as an agent at all, which is the way the term is used in the first clause and § 8. Rather than misrepresenting his agency relation, as in the first clause, in these cases the agent misapplies the powers delegated by the principal, which he is able to do because of apparent authority. The language of § 261, to which Comment e of § 219(2)(d) refers, makes this clear: "[a] principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud." The employee, by definition in these cases, is acting outside the scope of employment, but the employer is liable nonetheless because, by giving the employee particular powers and holding him out as an agent, the employer enabled the employee to commit a tort under the guise of apparent authority. One of the examples in Comment e to § 219(2)(d) lends further support to this reading. It states that liability will exist in the case of a servant who "may be able to cause harm because of his position as agent, as where a telegraph operator sends false

messages purporting to come from third persons." Although the principal is entirely innocent in such cases, liability is based on the fact that the principal placed the agent in a position, undetectable to reasonable third parties, that enabled the tort. See *id.* § 261 cmt. a. In the final analysis, it is the abuse of delegated authority, coupled with the victim's reasonable perception of apparent authority, that forms the basis of liability.

In Ellerth's case, the delegated authority theory of the second clause could come into play if further development of the facts indicates that Slowik was not acting within the scope of his actual authority, but she reasonably believed that he was empowered to take certain actions. Again, this would not require a finding that Burlington created the impression that Slowik was authorized to commit sexual harassment. It could no more do that than it could give him apparent or actual permission to engage in racial discrimination in hiring, or to refuse to accommodate an employee's legitimate religious needs, or to discriminate against the disabled. As in the case of the scope of employment issue discussed above, the § 219(2)(d) apparent scope of authority question relates to the authority Slowik appeared to have as Burlington's agent: for example, could he hire and fire employees at Ellerth's level; could he control work assignments; could he require someone to relocate from Chicago to New York; how extensive a budget did he control? Understood this way, apparent scope of authority would be important here only if Slowik's actual authority over Ellerth's job were less than it appeared to be. If Slowik's exercise of delegated authority led Ellerth to believe (reasonably) that he could cause her to be fired, even if he could not, then conduct outside the scope of his employment might be actionable under the second clause of § 219(2)(d). *Cf. North v. Madison Area Ass'n for*

Retarded Citizens-Developmental Ctrs., 844 F.2d 401, 407 (7th Cir.1988). If, for example, Slowik required Ellerth to attend meetings with him, endure harassing telephone calls, subject herself to unwanted touching, and the like, because he used his delegated authority as Vice President to create the impression that he had plenary power over her employment position, the second clause of § 219(2)(d) would provide a basis for holding Burlington responsible for his actions. See also *Champion v. Nationwide Security, Inc.*, 450 Mich. 702, 545 N.W.2d 596, 601 (1996) (employer liable where supervisor used his delegated power to place subordinate in situation that facilitated rape).

As is the case with liability for actions within the scope of employment, the existence of a policy forbidding sexual harassment does not alter the employer's liability under § 219(2)(d). Such a policy tells the employee nothing about the breadth of the supervisor's duties and powers within the company, which is the only relevant question, and there is obviously never a case in which a company could confer either actual or apparent authority to violate the law.

The requirement of apparent authority brings an objective element to the analysis that avoids the hazards of both the Second Circuit's interpretation in *Karibian*, which runs the risk of imposing absolute liability on employers for the intentional torts of employees, and the Third Circuit's view in *Bouton*, which too easily excuses employers from making efforts to protect vulnerable subordinates. As we implied in *Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir.1995), when a supervisor's harassing conduct is outside the scope of employment, the facts must show that the plaintiff was reasonable in believing the supervisor acted with authority. If so, then liability would follow under the principles of § 219(2)(d). If not, then the employer will be

liable only if it was negligent or reckless. See § 219(2)(b); *Baskerville*, 50 F.3d at 432.

IV

In summary, we conclude that Ellerth's complaint was broad enough to encompass both *quid pro quo* and hostile work environment sexual harassment. Ellerth's evidence would permit a finding that Slowik's conduct, under the governing agency principles, was undertaken within the scope of his employment with Burlington. She therefore presented enough to withstand Burlington's summary judgment motion. Under this theory, her failure to complain formally under Burlington's sexual harassment policy will not be fatal to her claim. (We make no comment on the relevance of Ellerth's complaints to other Burlington employees and supervisors, which may be pertinent on remand as well.) Policies that make clear the unacceptable nature of sexual harassment and that establish effective systems for its prevention and redress are extremely valuable, both in cases that must proceed on the basis of a negligence theory, and as a healthy dose of preventive medicine. However, as this Court noted in *Baskerville*, supra at 431, when harassment takes the form of an abuse of authority, agency principles will often permit liability even without employer negligence.

The decision of the district court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

ORDER

Jan. 28, 1997

The petition for rehearing with suggestion for rehearing en banc in the above-entitled case is GRANTED, the panel decision is VACATED, and the appeal is restored to the calendar for oral reargument before the full court at a date and time to be announced.

APPENDIX C

United States District Court,
N. D. of Illinois
Eastern Division.

No. 95 C 839.

Kimberly B. Ellerth,

Plaintiff,

v.

Burlington Industries, Inc.,

Defendant.

Jan. 19, 1996.

Employee sued her former employer for sex discrimination and constructive discharge under Title VII. Employer moved for summary judgment. The District Court, Castillo, J., held that: (1) fact question as to whether supervisor's actions were so severe as to create hostile work environment precluded summary judgment under that theory, but (2) employer was not responsible for supervisor's actions.

Summary judgment granted.

MEMORANDUM OPINION AND ORDER

CASTILLO, District Judge.

Plaintiff Kimberly B. Ellerth ("Ellerth") sues defendant Burlington Industries, Inc. ("Burlington") for sex discrimination and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. Ellerth alleges that while employed at Burlington she

was inappropriately touched and sexually harassed by her superior, Theodore Slowik, subjecting her to a hostile work environment in violation of Title VII's prohibition against discrimination on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). Ellerth also contends that Slowik's harassment of her resulted in her constructive discharge. Burlington's motion for summary judgment is presently before the Court. After careful review, the Court finds that there is no genuine issue of material fact and judgment should be entered for Burlington on both counts of Ellerth's complaint as a matter of law.

RELEVANT FACTS

The following undisputed facts are gleaned from the parties' respective Local Rule 12 statements of material facts and accompanying exhibits.[1] Burlington is a manufacturer of

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[1] The following facts are drawn from the parties' respective Local General Rule 12(M) and (N) statements of material facts as to which there is no genuine issue, and the accompanying exhibits, *see* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS LOCAL GENERAL RULE 12. Local General Rule 12(M)(3) requires a party moving for summary judgment to file "a statement of material facts as to which the moving party contends there is no genuine issue." The movant's statement must contain "specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth." Burlington's statement shall be cited herein as "Def.'s Facts ¶ —." Similarly, Local General Rule 12(N)(3)(a) requires the nonmoving party to file a concise response to the movant's statement including, in the case of any disagreement, specific references to supporting materials. Ellerth's response shall be cited as "Pls.' Facts ¶ —." Pursuant to Local General Rule 12(N)(3)(b), the nonmoving party may also submit a statement of "additional facts that require the denial of summary judgement," with respect to which the movant, in turn, may respond. Ellerth did not file any such statement of additional facts. Instead, Ellerth frequently raised additional factual matters in her Rule 12(N)(3)(a) response by means of such expressions as: "Admit [or deny as the case may be]. *Ellerth adds*, *however* . . ." The problem with Ellerth's departure from the Rules is that it affords Burlington no mechanism for responding to Ellerth's additional facts—there is no such thing, for example, as a reply to the nonmoving party's Rule 12(N)(3)(a) response. Accordingly, Burlington asks the Court to disregard the "tainted" portions of Ellerth's response. Of course, this is not a particularly proper means of requesting action by a court. Essentially, Burlington seeks an Order from the Court striking Ellerth's response. As Federal Rule of Civil Procedure 7 instructs, "An application to the court for an order shall be by motion," not by way of a "request" stuck in a footnote in a reply brief. Had Burlington filed an appropriate motion, this issue could have been taken up by the parties in a timely fashion. Instead, here the Court sits with a fully briefed dispositive motion, with one party requesting this Court to disregard this or that factual assertion.

It strikes the Court that there are several alternatives here. First, the Court could attempt to "disregard" portions of Ellerth's 12(N)(3)(a) submission as Burlington requests. This approach would entail a somewhat artificial parsing of Ellerth's response and would not substantially serve the ends of justice. Alternatively, the Court could strike Ellerth's response and direct her to file an appropriate Rule 12(N)(3)(a) statement and a Rule 12(N)(3)(b) statement (if that is her desire), to which Burlington could then formally respond. Or, the Court could simply grant Burlington time to respond, if it desires, to Ellerth's Rule 12(N)(3)(a) submission—thereby affording Burlington the opportunity to controvert any "additional factual assertions" made by Ellerth. Of course, Burlington has not indicated that it desires any opportunity to respond or that it believes Ellerth's factual representations are incorrect. Both of these latter approaches involve needless delay. Accordingly, having carefully and fully considered all of the materials before it, the Court concludes that the wisest course here is to deny Burlington's request and to consider all factual assertions made by Ellerth (to the extent that they are supported by the record). However, unlike properly presented 12(N)(3)(b) factual assertions, the Court will not deem them admitted as a result of Burlington's failure to properly respond.

textiles and home furnishings which employs over 22,000 people and operates more than 50 plants and offices around the United States, including a Chicago office. (Def.'s Facts ¶¶ 2, 5). Ellerth first interviewed with Burlington in mid-March 1993, at which time she was interviewed by Mary Strenk Fitzgerald ("Fitzgerald"). Fitzgerald was a national

accounts manager in Burlington's Mattress Fabric (or "Ticking") division. Shortly after the Fitzgerald interview, Ellerth had a second interview, this time meeting with Theodore Slowik ("Slowik"), who holds the position of vice president of sales and marketing for Burlington's House Mattress Ticking division and who works out of Burlington's New York office. About one week later, Fitzgerald called Ellerth to offer her the position of merchandising assistant in the Chicago office. Ellerth accepted.

As a merchandising assistant, Ellerth assisted Fitzgerald in her day to day activities. She also spoke with Slowik by phone approximately once per week. Additionally, Ellerth's position required occasional travel, generally for training-related purposes. Ellerth's immediate supervisor while she held this position was Fitzgerald. (*Id.* ¶ 11). Fitzgerald reported directly to Slowik. (Pl.'s Facts ¶ 11).

In February and March of 1994, following interviews with Patrick Lawrence and Slowik, Ellerth received a promotion to the position of sales representative for the Ticking Division's Midwest territory. (Def.'s Facts ¶ 12). Lawrence became Ellerth's immediate supervisor after that promotion. In turn, Lawrence reported to Slowik.

Throughout her employment at Burlington, Ellerth saw Slowik when he came to Chicago, on average, for a day or two every month or two. (*Id.* ¶ 17). In addition, Ellerth states that she saw Slowik when she traveled to New York, North Carolina and San Francisco for training, and that she spoke with Slowik approximately once a week. (Pl.Dep. at 49, 58, 93-94, 131, 215-216).

Ellerth claims that Slowik's harassment of her began as early as her preemployment interview with him. Ellerth contends that during that interview, Slowik asked her if she was married, if she planned on having a family, and if she

was "practicing" to have a family. Ellerth further alleges that Slowik stared at her in a sexual way such as staring at her chest for prolonged periods of time, and staring at her legs. Ellerth contends that the stares were constant throughout the entire interview and that she felt "humiliated" during the interview. (Def.'s Facts ¶ 18). Notwithstanding this experience, after the interview, Ellerth sent a follow-up letter to Fitzgerald in which she wrote, "I appreciated the chance to meet with Mr. Slowik before he returned to New York. The insight that he gave me into the position only provided me with more incentive to take the job he offered."

The next time Ellerth saw Slowik—the summer of 1993, when she travelled to New York for training—the harassment allegedly continued. (Def.'s Facts ¶ 20). Ellerth was in New York for approximately five days. Although she could not recall the exact number of times she saw Slowik in New York, Ellerth testified that she had more than five conversations, most lasting about five minutes, but two that were longer (about an hour) in duration. The first of these two longer conversations took place in Slowik's office. Slowik allegedly told one off-colored joke at the end of that conversation. Ellerth does not remember the content of the joke. (*Id.* ¶¶ 22, 23; Ellerth Dep. at 57-66). Ellerth testified that there were "around four" incidents during her training trip to New York in which Slowik told off-colored, offensive jokes. (*Id.* ¶ 23; Ellerth Dep. at 63, 65).

The second extended conversation Ellerth had with Slowik in New York took place during a lunch meeting at a restaurant near Burlington's New York office in which Angelo Brenna, Burlington's vice president of international sales, was also present. The lunch lasted approximately one to one and a half hours during which time Ellerth claims Slowik told "well over ten," offensive jokes of a sexual nature. Although she could not recall the exact number of

offensive jokes, Ellerth testified that they were frequent and constant. (Def.'s Facts ¶ 24; Ellerth Dep. at 70-71). Ellerth also testified that during one of these jokes, Slowik reached over and rubbed her knee under the table. Ellerth pulled her leg away and said nothing to Slowik or Brenna; Ellerth assumed Brenna had not seen the rubbing. (Def.'s Facts ¶ 24; Ellerth Dep. at 75-76). While walking back to the Burlington office after lunch, Ellerth was walking about three or four feet in front of Slowik and Brenna when Slowik allegedly commented, "you have got great legs, Kim. What do you think, Angelo?" (*Id.* ¶ 25). Ellerth testified that, after that remark was made, she turned and looked at Slowik who was staring at her legs. (Ellerth Dep. at 81). Ellerth testified that when she returned to the office after lunch, she told two women, one named Marilyn and the other named Laura Peffal, that Slowik and Brenna had been "very loud and obnoxious and rude and very offensive at lunch." (Pl.Dep. at 82-83). Ellerth had no other interactions with Slowik in New York.

Following the New York trip, Ellerth has no specific recollection of seeing or speaking with Slowik until approximately one month later when she traveled to Greensboro, North Carolina for additional training.[2] Ellerth was in North Carolina for one work week (i.e., Monday through Friday). (Def.'s Facts ¶ 27). Ellerth first saw Slowik in North Carolina about three days after she arrived, when she

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[2] Ellerth specifically stated that she could not recall talking to Slowik between the New York trip and the North Carolina trip. (Ellerth Dep. at 163). Immediately thereafter she stated that Slowik had called her "before [her] training visits to ask [her] questions if Betsy [Fitzgerald] was not around." (*Id.*) Ellerth further stated that every single time she talked to him on the phone, Slowik made a sexually inappropriate comment to her. (*Id.* at 164.) Other than "Kim, how are your legs," Ellerth could not recall any specific comments. (*Id.*)

had dinner with Slowik, a sales representative named Dan, and Dan's wife. Ellerth states that Slowik was loud and obnoxious during dinner and gave the waitress a hard time. Ellerth's deposition testimony regarding the nature of Slowik's offensive conduct *vis-a-vis* the waitress is indefinite at best. She testified that she did not recall how Slowik was giving the waitress a hard time. When first asked if he was giving the waitress a hard time "in a sexual way" or "making offensive sexual comments to her," Ellerth stated that she could not recall. (Ellerth Dep. at 103). Upon further inquiry, Ellerth responded that Slowik's comments were "probably" about the waitress' appearance because that is what Ellerth would find offensive. (*Id.*; *see also id.* at 117 ("I recall that I was very offended with what he said to the waitress, and I know the only way that I would be offended or embarrassed is if there was a situation where he was talking sexually offensive")).

Upon returning to the hotel after dinner, Slowik invited Ellerth to accompany him to the hotel lounge. Ellerth accepted. Ellerth testified that, while in the lounge, Slowik commented about the female band members stating that they had nice breasts, nice legs and nice, skimpy outfits. (Def.'s Facts ¶ 29). Ellerth further states that, regarding breasts, Slowik asked, "[y]ou are a little lacking in that area, aren't you Kim?" Ellerth did not reply to Slowik's comments and she claims that Slowik told her that she "ought to loosen up." (*Id.*). At the bar, Slowik allegedly engaged in prolonged looks at Ellerth's breasts and legs. Upon leaving the bar, Ellerth claims that Slowik stated, "You know, Kim, I could make your life very hard or very easy at Burlington." (*Id.*). Ellerth understood this comment to mean that she would have to have sex with Slowik to succeed at Burlington. (Ellerth Aff. ¶ 22). Ellerth could not recall seeing Slowik again during

her week in North Carolina, and believed that that evening was the only time she talked to him that week.

Following the North Carolina trip, Ellerth next specifically recalled seeing Slowik in the fall of 1993 when he visited the Chicago office.[3] Ellerth was on the floor folding fabric samples when Slowik walked by with another employee and allegedly commented, "on your knees again, Kim?" (Def.'s Facts ¶ 32). Ellerth understood the comment to be a reference to fellatio, which she found to be degrading and offensive. (Ellerth Aff. ¶ 27). On another occasion during which Slowik was in the Chicago office in the fall of 1993, he was making phone calls from Ellerth's office and when she walked in to the office, Slowik commented, "It's nice to have my butt where your butt was, Kim." (Def.'s Facts ¶ 34).

The next specific incident in which Ellerth could recall seeing Slowik was at the company holiday party in December, 1993. Ellerth claims that Slowik approached her husband, patted him on the shoulder and said, "You are a lucky man to have a woman like that," referring to the plaintiff. (Ellerth Dep. at 148). In addition, plaintiff alleges that Slowik patted her rear as he walked past her during the party. (Def.'s Facts ¶ 35).

The next incident that Ellerth could specifically recall in which she saw Slowik was her promotion interview in March

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[3] In her deposition, Ellerth testified that she believed that there was at least one other time, between the summer and fall of 1993, when Slowik was at the Chicago office, but she had no specific recollection of seeing him. (Ellerth Dep. at 130-31).

of 1994.[4] At this interview, Ellerth claims that Slowik agreed he had told others that she was "arrogant" because she was not "loose enough" for him, and that this gave him hesitations about promoting her. (Def.'s Facts ¶ 36; Ellerth Dep. at 199). Ellerth also states that Slowik reached over and rubbed her knee during the interview, and when discussing the travel associated with the new position, Slowik asked, "isn't your husband going to miss you." (Def.'s Facts ¶ 36). When he called to inform her that she had received the promotion, Slowik allegedly made a sexually inappropriate comment that caused Ellerth to cry. She could not recall the comment.[5] (Def.'s Facts ¶ 37).

Later that same month, plaintiff traveled to San Francisco for a bedding conference. Ellerth claims that she saw Slowik often but for the first three or four days Slowik ignored her. Ellerth believes that this was because she had not responded favorably to his harassment. (Pl.Dep. at 216, 244). However, on the last day of the conference, Slowik allegedly made a sexually inappropriate comment to Ellerth about her "ass." (Def.'s Facts ¶ 38). Slowik allegedly was staring at Ellerth's "back end" when he made this comment. (Ellerth Dep. at 247). The incident caused Ellerth to run to the bathroom to cry.

The foregoing incidents involve Ellerth's face-to-face interactions with Slowik. During her employment at Burlington, Ellerth spoke with Slowik by phone repeatedly;

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[4] Ellerth testified that there were other occasions, following the holiday party and prior to her promotion interview in March of 1994, when Slowik was at the Chicago office and said things to her that upset her; however, she had no specific recollection of those incidents.

[5] Ellerth testified that "every time I was on the phone with him I ended up most—in tears." (Ellerth Dep. at 206-07).

Ellerth claims that Slowik's harassment of her was a common feature of these phone conversations. The conversations were brief—usually Slowik would ask a work-related question and Ellerth would answer. Ellerth estimated that the frequency of these calls was approximately once per week. (Ellerth Dep. at 131, 163). Although Ellerth testified that Slowik did not tell vulgar jokes on the phone, she stated that "there were sexual innuendos on the phone, all phone conversations." (*Id.* at 132). As specific examples of Slowik's comments, Ellerth recalled being asked by Slowik, "How are those legs of yours, Kim?" Slowik also asked Ellerth if she was still practicing having a family with her husband. (*Id.* at 132-33). In a phone conversation that occurred in February or March of 1994, Slowik allegedly said to Ellerth that it "must be hard for a woman like you, Kim, to have a job like that—a woman with great legs." (*Id.* at 172, 174). In a phone conversation that occurred in April of 1994, Slowik allegedly told Ellerth "a very offensive joke about blonds, a limo and sex." (*Id.* at 253). Although she could not recall the specifics of the joke during her deposition, Ellerth has submitted an affidavit along with her opposition to the instant motion for summary judgment in which she recounts the joke as follows: "What's the difference between a blonde and a limo? Not everyone's been in a limo." (Ellerth Aff. ¶ 45). On another occasion, when Ellerth was talking to Slowik to get special permission to do something for a customer, Slowik said something along the lines of "I don't have time for you right now, Kim, unless you're telling me—unless you want to tell me what you are wearing." Ellerth said she had to go and hung up. On a follow up call, again to get permission, Slowik told Ellerth that she did not have permission for the project and he then said something along the lines of "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck

of a lot easier." (*Id.* at 256-58). These latter calls occurred in about May of 1994.

Ellerth was aware throughout her employment that Burlington maintained a policy against sexual harassment. (Pl.Dep. at 358). She received a copy of Burlington's employee handbook and read the policy against sexual harassment in the handbook. (*Id.*; Def.'s Facts ¶ 42). Ellerth chose not to inform her supervisors or anyone in authority regarding Slowik's conduct because her husband advised her not to say anything to anyone because it would jeopardize her job. (Pl.'s Facts ¶ 43). Ellerth never informed Fitzgerald or Lawrence, her direct supervisors, about the alleged harassment while she was employed at Burlington. (Def.'s Facts ¶¶ 44, 45). Ellerth stated that she chose not to inform Lawrence because "it would be his duty as my supervisor to report any incidents of sexual harassment," thus putting her job in jeopardy. (Def.'s Facts ¶ 45; Pl.Dep. at 357). Ellerth claims that she told several Burlington employees and one Burlington customer that she was being harassed by Slowik.[6] Ellerth admits that none of the employees were her superiors. (Pl.'s Facts ¶ 46). Ellerth did complain to her husband and parents on numerous occasions that Slowik sexually harassed her from the beginning of her employment with Burlington. (Def.'s Facts ¶ 47). On one occasion, after Slowik made an "embarrassing and humiliating" sexual innuendo, plaintiff claims that she told Slowik that what he said was inappropriate. (Rule 12(M) ¶ 48; Pl.Dep. at 143-145).

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[6] Each individual denies that Ellerth ever complained of sexual harassment by Slowik. However, in a motion for summary judgment, this Court must look at all evidence in the light most favorable to the non-moving party. Therefore, the Court will assume that plaintiff informed these individuals of the alleged harassment for purposes of this motion.

In May of 1994, approximately two months after Ellerth received her promotion, Lawrence and Donna Thibideau, Burlington's Customer Service manager received some complaints about Ellerth. (Pl.'s Facts ¶ 14). Lawrence sent Ellerth a memorandum on May 22, 1994 regarding the complaints he had received. (Def.'s Facts ¶ 15; Ellerth Dep., Ex. 2). On May 31, 1994, Ellerth left a message on Lawrence's answering machine informing him that she was quitting. She also faxed him a letter to the same effect. The letter received by Lawrence did not mention that plaintiff had been sexually harassed by Slowik. (Def.'s Facts ¶ 16). Ellerth claims that the letter she transmitted to Lawrence did not refer to the sexual harassment because, on her husband's advice, she had redacted the sentences she had written regarding her harassment. (Pl.'s Facts ¶ 16). (Rule 12(M) ¶ 16). About three weeks later, in a letter dated June 21, 1994, Ellerth wrote to Lawrence, essentially stating that she had quit because she was being harassed by Slowik. (Pl.'s Ex. I).

DISCUSSION

Summary Judgment Standards

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). A genuine issue for trial exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The court must view all evidence in a light most favorable to the nonmoving party, *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 659 (7th Cir.), *cert. denied*, 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987), and draw all inferences in the nonmovant's favor. *Santiago v. Lane*, 894 F.2d 218, 221 (7th Cir.1990).

However, if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Liberty Lobby*, 477 U.S. at 249-50, 106 S.Ct. at 2510- 11; *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024, 1032 (7th Cir.), *cert. denied*, 488 U.S. 909, 109 S.Ct. 261, 102 L.Ed.2d 249 (1988). In determining whether a genuine issue exists, the court "must view the evidence presented through the prism of the substantive evidentiary burden." *Liberty Lobby*, 477 U.S. at 254, 106 S.Ct. at 2513. In making its determination, the court's sole function is to determine whether sufficient evidence exists to support a verdict in the nonmovant's favor. Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge when deciding a motion for summary judgment. *Liberty Lobby*, 477 U.S. at 255, 106 S.Ct. at 2513-14. Finally, we note that mere conclusory assertions, unsupported by specific facts, made in affidavits opposing a motion for summary judgment, are not sufficient to defeat a proper motion for summary judgment. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188-89, 111 L.Ed.2d 695 (1990) ("The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir.1985) ("Conclusory statements in affidavits opposing a motion for summary judgment are not sufficient to raise a genuine issue of material fact").

Hostile Environment Sexual Harassment

Title VII prohibits "discriminat[ion] . . . against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000e- 2(a)(1). Title VII's prohibition against sex discrimination includes sexual

harassment in the workplace. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404-05, 91 L.Ed.2d 49 (1986). Courts commonly distinguish between two types sexual harassment: *quid pro quo* harassment and hostile work environment harassment. *Quid pro quo* harassment occurs where the employer conditions tangible employment benefits on submission to sexual demands. *See Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 461 (7th Cir.1990). To establish harassment of the hostile work environment type, the plaintiff must establish that the challenged conduct " 'has the purpose or effect of unreasonably interfering with [the] individual's work performance or creating an intimidating, hostile or offensive working environment.' " *Meritor*, 477 U.S. at 65, 106 S.Ct. at 2405 (quoting 29 C.F.R. § 1604.11(a)(3)). Significantly, *Meritor* held that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Id.* at 67, 106 S.Ct. at 2405 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir.1982)). As the Seventh Circuit recently noted:

> To determine whether the plaintiff's work environment is hostile within the meaning of Title VII, we consider a variety of factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 534 (7th Cir.1993) (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, ——, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993)); *see also Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir.1994) (noting that "not all conduct that has sexual

overtones can be characterized as the sort of sexual harassment that is forbidden by the statute. For the harassment to be actionable, it must be sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working atmosphere."); *Koelsch v. Beltone Electronics Corp.*, 46 F.3d 705, 708 (7th Cir.1995) ("Isolated and innocuous incidents do not support a finding of sexual harassment."). The inquiry focuses on the totality of the circumstances and no single factor is required or determinative. *Id.* Finally, these factors are evaluated from both a subjective and objective viewpoint. That is, the actual effect of the conduct on the plaintiff is considered as is the likely impact on a reasonable person in the plaintiff's position. *Id.*; *Doe*, 42 F.3d at 444; *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1454-57 (7th Cir.1994).

In the instant case, and for purposes of this motion only, Burlington does not dispute the occurrences of Slowik's harassing conduct as alleged by Ellerth.[7] Rather, Burlington advances several arguments as to why, as a matter of law, it can not be found liable for Slowik's conduct. First, Burlington contends that Ellerth's complaint is untimely as to most of the alleged conduct and that the remaining conduct does not amount to actionable sexual harassment because it is not sufficiently severe or pervasive. In this regard, Burlington contends that Ellerth cannot invoke the "continuing violation" doctrine to bring the untimely conduct within the ambit of her complaint. Burlington's second principal contention is that it cannot be held liable for Slowik's conduct because it did not know, or have reason to

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[7] In light of Burlington's admission on this point, the Court will dispense with the hedge "allegedly," as in "Slowik 'allegedly' rubbed Ellerth's knee."

know, of Slowik's conduct. We address these arguments in turn below.

1. *Timeliness and the Continuing Violation Doctrine*

As Burlington correctly observes, in Illinois a complainant must file a charge of discrimination within three hundred days of the alleged harassment. Conduct occurring more than 300 days before the filing of a charge of discrimination cannot be the sole basis of a Title VII sexual harassment claim. *Koelsch*, 46 F.3d at 707. Ellerth filed her charge of discrimination on October 17, 1994; therefore, only conduct that took place after December 20, 1993 can serve as the basis for Ellerth's recovery under Title VII, unless the continuing violation doctrine applies. Under that theory, acts of discrimination that are otherwise time-barred may be actionable under certain limited circumstances. *See, generally, Stewart v. CPC Int'l, Inc.*, 679 F.2d 117 (7th Cir.1982); *Selan v. Kiley*, 969 F.2d 560 (7th Cir.1992).

This Court recently discussed the parameters of the continuing violation theory in *Egan v. Palos Community Hosp.*, 889 F.Supp. 331, 334-337 (N.D.Ill.1995). There, we noted that the Seventh Circuit has recognized three viable theories under which a plaintiff may successfully appeal to the continuing violation theory. See *id.* at 335. Only one of those theories, the "serial violation" or "pattern of ongoing discrimination" theory is relevant here, and we confine our discussion to that theory. The Seventh Circuit has described this theory as applying to:

> cases in which the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy. . . . In such cases the challenged practice is evidenced only by a series of discrete, allegedly discriminatory,

> acts. This brand of continuing violation has also been referred to as a "serial violation," *Mack*, 871 F.2d at 183, and as a "pattern of ongoing discrimination." *Santos v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 641 F.Supp. 353, 357 (N.D.Ill.1986).

Selan, 969 F.2d at 565. In order to invoke this variant of the continuing violation doctrine, Ellerth must show that defendant's acts were "related closely enough to constitute a continuing violation" rather than constituting "merely discrete, isolated, and completed acts which must be regarded as individual violations." *Id.* (internal quotation marks omitted). As we summarized in *Egan*, the pertinent factors to consider in making this distinction are:

> (1) subject matter—"Do the alleged acts involve the same type of discrimination tending to connect them in a continuing violation?" *id.*; (2) frequency—"Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision?" *id.*; and, (3) degree of permanence—"Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights?" *Id.* Of these three factors, the third is the most significant. *Id.* As explained in *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir.1989):
>
> What justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions

established a visible pattern of discriminatory treatment. *Id.* at 1310.

Egan, 889 F.Supp. at 335-36. More recently, in *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279 (7th Cir.1993), Judge Posner, writing for the court, explained:

> If it is only with the benefit of hindsight, after a series of discriminatory acts, that the plaintiff can realize that he is indeed a victim of unlawful discrimination, he can sue in regard to all of the acts provided he sues promptly after learning their character. . . . If, however, he knows or with the exercise of reasonable diligence would have known after each act that it was discriminatory and had harmed him, he may not sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one. So the fact that a series of discriminatory or otherwise unlawful acts is indeed a series, a continuum, rather than a concatenation of unrelated acts, will delay the deadline for suing with respect to the earliest acts in the series only if their character was not apparent when they were committed but became so when viewed in the light of the later acts.

Id. at 281-82. *See also Doe*, 42 F.3d at 446 (noting that "the purpose of permitting a plaintiff to maintain a cause of action on the continuing violation theory is to permit the inclusion of acts whose character as discriminatory acts was not apparent at the time they occurred").

Ellerth's deposition testimony leaves little doubt that she was aware of the discriminatory nature of Slowik's conduct virtually from the outset of her contacts with him. She testified that Slowik's question during her initial interview about whether she was married was "inappropriate" and the

question about whether she was practicing to have a family with her husband was "offensive" and "humiliating." *See* Pl.'s Facts ¶ 8. Indeed, she told her husband and her mother about Slowik's conduct. Ellerth Dep. at 92. However, she "did not complain about Slowik's offensive behavior during his initial interview . . . in the 'follow-up' letter that [she] sent . . . because Slowik's initial interview of me was merely the first incident in Slowik's campaign of sexual harassment against me and I was still hoping, at that point, that by ignoring Slowik's sexual harassment he might cease such behavior on his own." Ellerth Aff. ¶ 8. We have no reason to question Ellerth's approach to dealing with Slowik's harassment; however, it is plain from her own account that she was aware of the nature of his conduct.

Then, a couple of months later when Ellerth travelled first to New York and later to North Carolina, Slowik's campaign of sexual harassment continued. Again, there can be little doubt from Ellerth's testimony that she was well aware of the harassing nature of Slowik's behavior. She referred to the jokes that Slowik told to her in his New York office as "off-colored," "dirty" and "offensive." Pl.'s Facts ¶ 23. She also testified that she could not recall more of the details concerning the joke Slowik told during her first long meeting with him in New York "because it had offended [her] so badly." Ellerth Dep. at 64. Similarly, she characterized Slowik's conduct (specifically the rubbing of her knee) at the luncheon meeting at a New York restaurant as "highly offensive and unwelcome." Ellerth Aff. ¶¶ 12, 13. She also attested that she felt "humiliated and degraded" by Slowik's comment about her legs on the walk back to the New York office after lunch. *Id.* ¶ 14.

Ellerth also states in no uncertain terms that she was aware of the nature of the sexual harassment to which she was being subjected after Slowik's conduct during her training

visit to North Carolina. In her affidavit, after recounting Slowik's repeated comments concerning the bodies and clothes of the all-woman band in the hotel lounge, his comment about her breasts, his comment that she should "loosen up," and most significantly his comment that he "could make [her] life very hard or very easy at Burlington," Ellerth attested:

> I understood Slowik's comment, "you know, Kim, I could make your job very hard or very easy at Burlington," as clearly implying that I would have to engage in sexual relations with Slowik in order to succeed in the business. Slowik's implication that he could make my life at Burlington very hard or very easy depending on whether I engaged in sexual relations with him was clear to me given the totality of the circumstances up to that point, namely Slowik's prior inappropriate comments regarding my appearance and my intimate marital relations, his staring at my breasts and legs, and his unwelcome and offensive touchings of my knees.

Ellerth Aff. ¶ 22. In view of Ellerth's clear awareness of the fact that Slowik was engaging in sexual harassment of her—an awareness that had crystallized in her mind certainly no later than the summer of 1993, she could not "sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one." *Moskowitz*, 5 F.3d at 282. Plainly, by the summer of 1993, Slowik's discriminatory conduct had the degree of permanence that should have triggered Ellerth's awareness of and duty to

assert her rights.[8] *Selan*, 969 F.2d at 565. Accordingly, we conclude that Ellerth cannot invoke the continuing violation doctrine to bring Slowik's time-barred conduct within the scope of the instant complaint. To the extent, if any, that Ellerth can prevail in her sexual harassment suit, her recovery may only be predicated on Slowik's conduct that occurred after December 20, 1993.

2. *Hostile Work Environment*

Although Ellerth can only recover for harassment occurring after December 20, 1993, this does not require that an "iron curtain" be dropped on December 20, 1993, shielding from consideration all evidence of Slowik's conduct before that day when considering whether Ellerth was subjected to an actionable hostile work environment. *Cf. Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1349 (7th Cir.1995). In *Hennessy*, the district court allowed in evidence of the employer's discriminatory conduct that occurred prior to November 21, 1991, the effective date of the Civil Rights Act of 1991. On appeal, after being found liable for sex discrimination and subject to a $300,000 punitive damage award, the employer claimed that it was improperly subject to retroactive liability because the trial court allowed the plaintiff to present evidence of pre-November 21, 1991 conduct. The Seventh Circuit squarely rejected this claim:

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[8] In opposition to Burlington's motion for summary judgment, Ellerth has submitted a summary chart of Slowik's sexual harassment, which chronicles each instance of harassment. Although the chart must be taken with a very large grain of salt (for instance, it assigns 15 instances of harassment to Ellerth's initial interview with Slowik), by Ellerth's own count, by the end of the summer of 1993 she had been subject to approximately 70 instances of harassment. *See* Pl.'s Ex. B.

> To read *Landgraf* as Penril urges would drop an iron curtain on November 21, 1991, shielding from view all evidence before that day. That would be an absurd situation as it would keep from the jury substantial evidence that could aid it in reaching a just verdict. The district court properly held that *Landgraf* did not prohibit the jury from hearing about pre-Act conduct of Penril and its agents which provided context and background regarding Hennessy's termination. . . .

Hennessy, 69 F.3d at 1349.

This Court believes that analogous reasoning permits it to consider Slowik's pre-December 20, 1993 conduct when considering the totality of Ellerth's circumstances at work and determining whether her work conditions amounted to a hostile environment.[9] It would be absurd to conclude that Slowik's conduct after December 20, 1993, had to be evaluated in a vacuum and without the context of his prior conduct. *Cf. Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir.1993) (noting that the court must consider the cumulative weight of several racial comments); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274-75 (7th Cir.1991) (noting that the acts of racial harassment must be considered in the context of ten years of verbal taunting). We have little difficulty concluding that Ellerth has raised a genuine issue of material fact as to whether she was subjected to a hostile work environment as a result of Slowik's conduct.

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[9] Of course, in the event that Ellerth survives the instant motion for summary judgment and proceeds to trial, a carefully drafted jury instruction will be given to the jury instructing them as to the proper and improper use of evidence pertaining to pre-December 20, 1993 conduct.

Burlington is quick to note that only a handful of harassing incidents occurred after December 20, 1993; however, when those incidents are viewed in the context of Slowik's pre-December 20 conduct, it is clear to this Court that it cannot hold, as a matter of law, that Ellerth was not subject to a hostile work environment. A reasonable jury could easily find that Slowik's pre- December 20, 1991 conduct—specifically his repeated objectification of her body, his weekly dirty joke phone calls, and his implicit statement that life for Ellerth could be very easy or very difficult for her depending on whether she submitted to his advances—deprived her of the "right to work in an environment free from discriminatory intimidation, ridicule and insult" and materially altered the conditions of her employment. *Meritor*, 477 U.S. at 65, 106 S.Ct. at 2405. Slowik's continuation of that conduct after December 20, 1991 perpetuated the existence of that hostile environment and the severity or pervasiveness of Slowik's conduct must be evaluated with reference to his prior conduct.

Specifically, this Court believes that a reasonable jury could find that Slowik's conduct in March of 1994, during which he rubbed Ellerth's knee while engaged in a promotional interview with Ellerth, could be regarded as reinforcing Slowik's previous persistent implicit messages to her that her value was as a sex object and that her growth in the company was dependent upon her sexual availability to him. So too could the jury find with respect to the April 1994 phone conversation in which Ellerth called to request special permission to put a customer's logo into some fabric and Slowik responded, "I don't have time for you right now, Kim, unless you tell me what you're wearing." Surely, a reasonable jury could find that this comment was tantamount to saying, "I, as your supervisor will have no time for you and will not assist you unless you talk dirty to me," and that such

a statement (particularly viewed in the context of Slowik's previous "I could make life very hard for you" remark) deprived Ellerth of a workplace free from discriminatory intimidation, humiliation and insult. Of course, this is equally true with respect to Ellerth's follow-up call in which Slowik denied Ellerth's request for permission and then inquired whether she was wearing shorter skirts yet because that could make her job "a whole heck of a lot easier."

It is very important to recognize in this regard that imbedded in Slowik's harassment of Ellerth is a *quid pro quo* proposition, dating back to the summer of 1993, which a jury could reasonably find pervaded her employment at Burlington.[10] It would not be unreasonable to conclude that every effort toward achievement that Ellerth made at Burlington was tainted by Slowik's threat, "I could make life

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[10] We do not mean to suggest that Ellerth has advanced a claim of *quid pro quo* sexual harassment. She has not. Both her complaint and memorandum of law opposing Burlington's motion for summary judgment expressly indicate that the nature of Ellerth's sexual harassment claim is that she was subject to a hostile work environment. (Indeed, there is authority to the effect that for Ellerth to prevail on a theory of *quid pro quo* harassment, she would have to prove that Slowik actually withheld tangible employment benefits as a result of her failure to submit to his sexual overtures. *See Gary v. Long*, 59 F.3d 1391, 1396 (D.C.Cir.1995); *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 186 (6th Cir.1992); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 649 (6th Cir.1986); *Jansen v. Packaging Corp. of Am.*, 895 F.Supp. 1053 (N.D.Ill.1995).)

> Our point here is simply that where a supervisor brandishes work-related threats or promises predicated on an employee's submission to sexual conduct, an overlap between *quid pro quo* and hostile work *environment harassment develops. See* Gary *v. Long*, 59 F.3d at 1396 ("Where a supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors does not constitute *quid pro quo* harassment, either may create or contribute to a hostile work environment.").

very hard for you." Moreover, a jury could reasonably find that Slowik's "joke," "What's the difference between a blonde and a limo? Not everyone's been in a limo," made during an April 1994 phone conversation, heaped insult upon injury by effectively communicating the message that Ellerth is a whore or a slut who sleeps with everybody.

In the final analysis, we are not persuaded by Burlington's arguments that Slowik's conduct was not severe or pervasive enough to alter the conditions of Ellerth's employment. Specifically, we reject Burlington's efforts at minimizing the pervasiveness of Slowik's harassment by noting that Ellerth saw Slowik on only a few occasions. Ellerth's testimony, which Burlington does not dispute for purposes of this motion, is that Slowik spoke with her approximately once per week and that Slowik made an offensive comment during every phone conversation. We believe that a reasonable jury could conclude that this conduct was sufficiently pervasive notwithstanding the fact that it was accomplished by long distance. The Court certainly agrees with Burlington that Ellerth's inability to recall the specifics of virtually all of Slowik's offensive comments greatly impairs the Court's ability to make a determination as to whether the comments are sufficiently severe. However, in evaluating Ellerth's conditions of employment we ask whether the discriminatory conduct is sufficiently severe *or* pervasive, *Meritor*, 477 U.S. at 67, 106 S.Ct. at 2405-06, and we cannot conclude that Slowik's conduct was not sufficiently pervasive. *See Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir.1991) (finding that although an offensive utterance alone does not give rise to Title VII liability, a pervasive pattern of racial jokes could be sufficient to sustain a hostile environment claim). Additionally, in view of the uncontested facts regarding Slowik's other comments that Ellerth could recall, we believe a jury could resolve this

uncertainty in favor of Ellerth and conclude that Slowik's comment's were sufficiently severe. *See Dey*, 28 F.3d at 1456-57. For all of the foregoing reasons, we conclude that Burlington is not entitled to judgment as a matter of law based on the contention that Slowik's conduct was not sufficiently pervasive or sever to create an actionable hostile work environment. Therefore the Court turns to the critical issue in this case: whether Slowik's alleged conduct imposes liability on his employer, Burlington.

Burlington's Liability for Slowik's Conduct

Since the Supreme Court's opinion in *Meritor*, it is clear that employers are not strictly liable for the discriminatory acts of their employees—even those employees at the supervisory or management level. *See Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408. Instead, *Meritor* instructs that courts should look to agency principles when evaluating whether employers should be held liable for the discriminatory acts of their supervisors.[11] *Id.*; *see also Doe v. R.R. Donnelley &*

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[11] Now that the majority of courts of appeals that have considered the issue have held that supervisors can not be found liable in their individual capacities for their discriminatory conduct, *see, e.g., U.S. E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir.1995); *Smith v. Lomax*, 45 F.3d 402, 403-04 & n. 4 (11th Cir.1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir.), *cert. denied*, 513 U.S. 1058, 115 S.Ct. 666, 130 L.Ed.2d 600 (1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir.), *cert. denied*, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d 491 (1994); *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587-88 (9th Cir.1993), *cert. denied*, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994), the question of employer liability has taken on added significance. As this Court foreshadowed in *Jendusa v. Cancer Treatment Centers of Am., Inc.*, "in those cases in which agency principles lead to the conclusion that the institutional employer is not liable for the conduct of its agent, a determination that Title VII does not authorize individual liability would effectively leave the victim without an adequate remedy. . . ." 868 F.Supp. 1006, 1013 n. 9 (N.D.Ill.1994).

Sons Co., 42 F.3d 439, 445 (7th Cir.1994) ("whether sexual harassment by a supervisor can be imputed to the employer corporation is governed by the principles of agency").

Following *Meritor*, many courts of appeal have issued opinions that attempt to delineate the parameters of employer liability under general principles of agency law. *See, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir.1995); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.1994); *Gary v. Long*, 59 F.3d 1391, 1395 (D.C.Cir.1995); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir.1995); *Nichols v. Frank*, 42 F.3d 503, 514 (9th Cir.1994); *Bouton v. BMW of North Am.*, 29 F.3d 103, 106 (3d Cir.1994); *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 576 (10th Cir.1990); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418 (10th Cir.1987); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir.1987). To date, the Seventh Circuit has not published any opinion that provides much guidance on how agency principles are to be applied in this context. *See Jansen*, 895 F.Supp. at 1060-61. Thus, we shall look for guidance in the opinions of our sister circuits, as well as Judge Shadur's recent opinion in *Jansen v. Packaging Corp.* of Am., 895 F.Supp. 1053 (N.D.Ill.1995).

Taking their lead from *Meritor*'s reference to the Restatement (Second) of Agency ("Restatement"), 477 U.S. at 72, 106 S.Ct. at 2408, most courts have looked to the Restatement for the guiding agency principles and have looked specifically to § 219. *See* citations *supra*. As the Third Circuit summarized in *Bouton*:

> The *Restatement (Second) of Agency* § 219 provides three potential bases for holding employers liable for sexual harassment perpetrated by their employees. Section 219(1) holds employers responsible for torts committed by their employees within the scope of

> their employment. Two of the four reasons listed in § 219(2) for imposing liability when an employee acts outside the scope of employment could also apply. Under § 219(2)(b), masters are liable for their own negligence or recklessness; in a harassment case, this is typically negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment. Finally, under § 219(2)(d), if the servant relied upon apparent authority or was aided by the agency relationship, the master is required to answer.

Bouton, 29 F.3d at 106. We now consider these potential bases for Burlington's liability.

Under § 219(1), the pertinent inquiry is whether Slowik's harassment of Ellerth was committed within the scope of his employment. In *Jansen*, the court found § 219(1) "plainly inapplicable" and brushed this question aside with a footnote: "Was sexual harassment within the scope of [the supervisor's] employment? Of course not." 895 F.Supp. at 1061 n. 9. Other courts have similarly held, *see Hicks*, 833 F.2d at 1417-18 ("sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business"), and we do not necessarily disagree. However, we do not believe that the question can be brushed aside quite so readily. Whether or not sexual harassment is, as the *Hicks* court put it, in the job description is quite beside the point. The Restatement makes clear that acts forbidden by the employer may nevertheless be within the scope of employment—even when consciously criminal or tortious. RESTATEMENT (SECOND) OF AGENCY (hereafter RESTATEMENT) §§ 230, 231. Sections 228 and 229 of the Restatement set out several factors relevant to determining whether the conduct of a servant falls within the scope of his or her employment. Although we will not recount all of those

factors here, we note that under § 228(1)(c) conduct of a servant is within the scope of employment if, and only if, the conduct "is actuated, at least in part, by a purpose to serve the master." RESTATEMENT § 228(1)(c). Conversely, "[c]onduct of a servant is not within the scope of employment if it is . . . too little actuated by a purpose to serve the master." *Id.* § 228(2). Section 235 and the accompanying comments are also instructive in this regard. Section 235 provides: "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." RESTATEMENT § 235. Comment a to this section explains:

> It is the state of the servant's mind which is material. Its external manifestations are important only as evidence. Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master.

id., cmt. *a.*, and comment c further notes:

> The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business. . . . In such cases, the facts may indicate that the servant is merely using the opportunity afforded by the circumstances to do the harm. Hence, unless the principal has violated a personal duty to the person injured, or unless he becomes liable because of the nature of the instrumentality entrusted to the servant, . . . he is not liable for such acts.

Id., cmt. *c*; *see also* cmt. *c* illustration 4.

We believe that there can be no per se answer to whether sexual harassment is within the scope of a supervisor's

employment but that each case must be analyzed on its own facts under the factors outlined in section 228 and 229. Certainly, it is within the realm of possibility that a supervisor's discriminatory intent could sufficiently overlap with an intent to serve the employer and that such harassing conduct could be found to be sufficiently actuated by a motive to serve the employer. Indeed, the Restatement explicitly recognizes this principle. *See* RESTATEMENT § 236 ("Conduct may be within the scope of employment, although done in part to serve the purposes of the servant. . . ."); *see also id. cmt. b* (explaining that "[t]he fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability. . . ."). However, this Court cannot conclude that Slowik's conduct was motivated in any way whatsoever by a purpose to serve Burlington; Slowik's conduct did not serve to accomplish any authorized purpose. Accordingly, we conclude that Burlington cannot be found liable for Slowik's conduct under § 219(1).

We next consider § 219(2)(b), which subjects an employer to liability for the acts of its employees acting outside the scope of their employment where the employer was negligent or reckless. This is by far the most commonly invoked basis for imposing employer liability and the Seventh Circuit's pronouncements that employer liability is generally governed by a negligence standard, *see, e.g.*, *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431-32 (7th Cir.1995) ("the criterion for when an employer is liable for sexual harassment is negligence"); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 535 (7th Cir.1993); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir.1990), can be traced to this provision. *See North v. Madison Area Ass'n*

for Retarded Citizens, 844 F.2d 401, 407 (7th Cir.1988) (recognizing *Meritor*'s admonishment to look to traditional agency principles and noting *Meritor*'s reference to sections 219-237 of the Restatement). In this case, it is clear that Ellerth cannot invoke § 219(2)(b) as a basis for imposing liability on Burlington for Slowik's conduct. Ellerth's own testimony establishes that although she was aware of Burlington's policy against sexual harassment, she never informed her immediate supervisor, Pat Lawrence, about Slowik's harassment because she feared it would put her job in jeopardy. Ellerth's deposition testimony was as follows:

> Q. Why didn't you ever tell Patrick Lawrence that you had been harassed?
>
> A. I didn't tell Pat because I was afraid that when Ted was confronted with this that my job would be more difficult.
>
> . . . . . .
>
> Q. So how would telling Patrick Lawrence put your job in jeopardy?
>
> A. Because it would be his duty as my supervisor to report any incidents of sexual harassment.
>
> . . . . . .
>
> Q. And that's why you didn't tell him because he had a duty to report it?
>
> A. I would have hoped that he would do his job to report it, but I did not want to tell him about it because he would report it thus putting my job in jeopardy.
>
> Q. You didn't give him the opportunity to report it, did you?

A. No I did not.

Q. Did you ever read the Burlington Company employee handbook?

A. Yes, I did.

Q. Did you read in there that there was a companywide policy against sexual harassment?

A. Yes, I did.

Ellerth Dep. at 356-58. Ellerth attempts to distance herself from this testimony by stating in her affidavit: "While I knew there was a policy against sexual harassment in the employee handbook, I was not aware of whether it was being enforced, whether it was in effect throughout my employment, or who to complain to should I experience a problem with sexual harassment." We find this self-serving statement to be insufficient to raise a genuine issue of material fact. Burlington's employee handbook states in pertinent part:

> **Equal Opportunity**
>
> [T]he Company will not tolerate any form of sexual harassment in the workplace.
>
> . . . . .
>
> [I]f you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk with your supervisor or human resources representative or use the grievance procedure promptly.

Def.'s Ex. F. Ellerth admits receiving a copy of the employee handbook and reading this policy statement. Ellerth Dep. at 358-60. If ever there was a time when she did not recall who to contact regarding the harassment she was enduring, she

need only have consulted her handbook. In view of Ellerth's acknowledgment of her deliberate failure to utilize the equal employment opportunity procedures outlined in the handbook, and her failure to take any other measures to notify appropriate Burlington management personnel about her harassment,[12] she has failed to raise a genuine issue of material fact as to whether Burlington knew or should have known about Slowik's conduct. Accordingly, she cannot rely on § 219(2)(b) as a basis for imposing liability on Burlington for Slowik's conduct.

Drawing on *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417 (7th Cir.1986), Ellerth argues that she need not establish that Burlington had actual knowledge of

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[12] Ellerth states that she complained about Slowik's sexual harassment to Donna Thibideau, Burlington's customer service manager between January and March of 1994; Sherry Hester, a Burlington customer service representative; Brent Schneider, a Burlington sales representative; Patrick Crosson, a Burlington sales representative; Marilyn (last name unknown), a Burlington "sample" person; Laura Peffal, a Burlington customer service representative; and Cara Jiminez, a Burlington customer. (Pl.' Facts ¶ 46). However, Ellerth admits that none of these people were her superior, (Def.'s Facts ¶ 46), or a human resources officer in a position to file a formal complaint in accordance with Burlington's Employee Handbook grievance procedure. Ellerth completely failed to report Slowik's harassment to anyone who would have received the complaints within the scope of their authority or who would have had a duty to report Slowik's conduct. Ellerth also claims that Angelo Brenna witnessed the harassment at the New York lunch. However, even assuming for the sake of argument that Brenna's observations at that lunch would have sufficiently alerted him to the fact that Slowik was harassing Ellerth, we cannot conclude that he had a duty to report Slowik's conduct. Any knowledge that Brenna might have had cannot be imputed to Burlington, for he neither received the knowledge while acting within the scope of his authority nor witnessed anything that even remotely concerned matters within the scope of that authority. *See Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320 (7th Cir.1992).

Slowik's harassment because Slowik was a manager at the decision-making level of Burlington and his acts can therefore be imputed to Burlington. In relevant part, *Hunter* states:

> Since the acts of a corporation are acts of human beings, to say that the "corporation" has committed some wrong (rather than just that it is liable under the doctrine of respondeat superior for an employee's wrong) simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong; the deliberate act of such a person is the corporation's deliberate act.

Id. at 1422. Notwithstanding the broad sweep of this language [which, we note, the Seventh Circuit has accurately described as *dicta*, *see Brooms v. Regal Tube Co.*, 881 F.2d 412, 420 (7th Cir.1989)[13], we do not believe that the language was intended to have the sweeping effect that Ellerth attributes to it. The language must be read in the context of the governing agency principles. The Seventh Circuit shed some light on this passage in *Shager v. Upjohn Co.*, which we quote at length because it is critically important to understanding the proper resolution of this issue:

> Discrimination is an intentional tort and as we noted earlier an employer is liable for the intentional torts of an employee only if they are in furtherance (though possibly misguided) of the employer's business, implying some relation between the tort and the business. . . . [A] supervisory employee who

[13] *See also Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir.1995). In *Baskerville*, Judge Posner, who also authored *Hunter*, declined to decide whether it was correct to treat a supervisor as the employer (hence imposing strict liability on the employer) in cases involving "an abuse of authority, as where a supervisor threatens to fire a subordinate if she refuses to have sex with him." *Id.* at 431-32.

> fires a subordinate is doing the kind of thing that he is authorized to do and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer. Restatement (Second) of Agency § 228 (1958). From the outside, at least, it looks as if he is doing his job, which is not the case when one worker sexually harasses another; and the appearance of authority provides a rough-and-ready criterion of respondeat superior. . . .

913 F.2d 398, 405 (1990). For purposes of this discussion, the foregoing passage is significant because it establishes that *Hunter*'s language was intended to do little more than express the general principles of scope-of-employment liability and/or liability under the apparent authority doctrine. And, notwithstanding Judge Posner's statement that "the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer," this Court believes, as we have endeavored above to illustrate, that an improper intent can indeed remove conduct from the scope of employment, *see* RESTATEMENT § 235 cmt. *a* and *c*. Moreover, as we stated above, we believe that the issue of whether conduct is within the scope of employment must be determined on a case by case basis with particular attention to the facts of each case. Notably, the example given by Judge Posner involved the firing of an employee *not* sexual harassment. We believe this distinction to be significant because there is likely to be a greater degree of overlap between the employer's purposes and the supervisor's discriminatory intent in the case of a discrete employment decision such as hiring and firing than in the case of creating a hostile work environment by soliciting sex from one's subordinates. What purpose of the employer is served by that conduct? None that we can discern.

Additionally, although the fact that a supervisor is doing the type of act that he is authorized to do, during working hours, and at an authorized place, gives rise to an inference that the employee is acting within the scope of his employment, RESTATEMENT § 235 cmt. *a*, that inference is rebuttable. *Id.* illustration 1. Where, as here, the supervisor's conduct is not tied to any specific employment decision and the employer has a published policy prohibiting sexual harassment, we must conclude that the inference has been rebutted. And, for reasons we discuss immediately below, we also find under the present facts, that Judge Posner's comments concerning apparent authority have no force here. Accordingly, we decline to impute Slowik's conduct to Burlington merely because he has some decision-making authority.[14]

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[14] Indeed, the actual extent of Slowik's decision-making authority is not open to much question. Burlington has submitted the affidavit of Slowik's superior, Salvatore V. Porio, executive vice president of Mattress Fabrics (or "Ticking"), who explains that Ticking is only one of five business units of the Burlington House Fabrics Group and the Group is only one of eight divisions of Burlington. Slowik is the vice president of Marketing and Sales for Ticking and reports to Porio. Porio states that he is "primarily responsible for the employment decisions affecting all employees in Ticking" and that he "approved the decision to hire and promote [Ellerth] and my signature is on the Personnel Change Form which memorializes both employment decisions." Porio Aff. ¶¶ 5, 6. Porio further states, "The position of Vice President of Marketing and Sales for Ticking held by Slowik is not considered an upper-level management position at Burlington. Further, Slowik is not amongst the decision-making or policy-making hierarchy of Burlington." *Id.* ¶ 8. On the other hand, Slowik testified in his deposition that he had ultimate decision-making authority regarding Ellerth's promotion. Slowik Dep. at 32. And Porio's affidavit does not conflict with this statement; after all, Porio merely states that he *approved the decision*. At most, Porio's affidavit merely raises issues about the degree of Slowik's authority which are not critical to the Court's resolution of this case.

The only remaining ground for imposing liability against Burlington for Slowik's conduct lies in § 219(2)(d), which subjects an employer to liability for the acts of its employees acting outside the scope of their employment where the employee "purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT § 219(2)(d).

On its face, § 219(2)(d) appears quite applicable to the instant case. Slowik certainly invoked his apparent authority when he asserted that he could make Ellerth's life at Burlington very easy or very hard, and it was precisely the existence of the agency relationship that permitted Slowik the opportunity to exploit his position of authority and harass Ellerth. However, these readings of § 219(2)(d) are too shallow and fail to adequately take into account the policy rationales underlying the rule.

With respect to the language "was aided in accomplishing the tort by the existence of the agency relation," we concur with the D.C. Circuit which observed that "[i]n a sense, a supervisor is always 'aided in accomplishing the tort by the existence of the agency' because his responsibilities provide proximity to and regular contact with, the victim," and concluded that the reach of this language was intended to be much narrower. *Gary v. Long*, 59 F.3d at 1397. The comments to § 219 and § 261[15] confirm that a narrower reading was intended. For instance, comment *e* to § 219 notes, "Clause (d) includes primarily situations in which the principal's liability is based upon conduct which is

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[15] Section 261 provides: "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud." RESTATEMENT § 261.

within the apparent authority of a servant. . . . In other situations the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons. See § 261." In turn, comment a to § 261 notes, "Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." Thus, the language appears to be intended to reach only conduct that on its face appears to be a natural and authorized incident of the agency. *See Gary*, 59 F.3d at 1397 (concluding that § 219(2)(d) "embraces a narrower concept that holds the employer liable only if the tort was accomplished by an instrumentality, or through conduct associated with the agency status") (internal quotation marks omitted).

Finally, notwithstanding Slowik's invocation of his apparent authority, we conclude that § 219(2)(d) still cannot support the imposition of liability on Burlington because Ellerth was fully aware that Slowik had exceeded the bounds of his authority. Section 166 of the Restatement provides: "A person with notice of a limitation of an agent's authority cannot subject the principal to liability upon a transaction with the agent if he should know that the agent is acting improperly." Comment *a* to this section further provides: "If a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability." *Cf.* RESTATEMENT § 165 ("A disclosed or partially disclosed principal is subject to liability upon a contract purported to be made on his account by an agent authorized to make it for the principal's benefit,

although the agent acts for his own or other improper purposes, *unless the other party has notice that the agent is not acting for the principal's benefit.*"); RESTATEMENT § 262 ("A person who would otherwise be liable to another for the misrepresentations of one apparently acting for him is not relieved from liability by the fact that the servant or other agent acts entirely for his own purposes, *unless the other has notice of this.*").

As the comment to § 262 explains, the rationale for imposing liability upon principals for acts that reasonably appear to fall within the scope of the agency is that: "A person relying upon the appearance of agency knows that the apparent agent is not authorized to act except for the benefit of the principal. This is something, however, which he cannot normally ascertain and something, therefore, for which it is rational to require the principal, rather than the other party, to bear the risk." RESTATEMENT § 262, cmt. *a*. Where, as here, an employer has published an explicit policy statement that prohibits sexual harassment, the employee has acknowledged receipt of the statement and has read the statement, and the employee is fully aware that her supervisor is engaging in unauthorized harassment, there is no sound reason in agency law or policy to require the employer to bear the risk of this conduct. To the contrary, under these circumstances, § 166 governs and forecloses the imposition of liability on the employer. *See Jansen*, 895 F.Supp. at 1066- 67; *see also Gary*, 59 F.3d at 1398 (finding that an employer's policy insulated it from liability and noting "[w]hile a supervisor might purport to act or speak on behalf of the employer, there can be no liability if the victim could not reasonably rely on the supervisor's representations."); *Bouton*, 29 F.3d at 109-10 (requiring the employee's belief in a supervisor's apparent authority to be reasonable and finding that an antidiscrimination policy known to employees

eradicates apparent authority). Accordingly, we conclude that § 219(2)(d) cannot support the imposition of liability on Burlington for Slowik's conduct.

One final issue with respect to Burlington's liability for Slowik's conduct, which we believe to be one of first impression, merits consideration. As this Court noted above, the hostile work environment to which Ellerth was subjected was created and maintained, in part, by Slowik's *quid pro quo* insinuations. *Quid pro quo* harassment, unlike hostile work environment harassment, has generally been treated as giving rise to strict liability on the part of the employer. *See, e.g., Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.1992) ("Under a *quid pro quo* theory of sexual harassment, an employer is held strictly liable . . . under a theory of respondeat superior"); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.1994) ("the law imposes strict liability on the employer for *quid pro quo* harassment"). Thus, we must consider whether the strict liability standard should apply in a case such as this where there is a *quid pro quo* component to the hostile work environment.

At the outset, we note that neither the doctrinal basis, nor the propriety, of applying strict liability in the context of *quid pro quo* harassment is entirely clear. Recently, in *Baskerville v. Culligan Int'l Co.*, the Seventh Circuit intimated that the propriety of the strict liability standard may be open to question when it remarked:

> An employer is not strictly liable for sexual harassment of one employee by another unless perhaps, the harassment takes the form . . . of an abuse of authority as where a supervisor threatens to fire a subordinate if she refuses to have sex with him. In such cases, a number of courts treat the supervisor as the employer . . . whether correctly or

> not we need not decide. (Neither the Supreme Court nor our court has had occasion to decide the question.) In all other cases, it is clear, the criterion for when an employer is liable for sexual harassment is negligence. . . .

50 F.3d 428, 431-32 (7th Cir.1995).

Indeed, there is no clear reason why the employer's liability in the context of *quid pro quo* harassment ought not to be determined by the same agency principles as those applied in the hostile work environment variant of harassment. When *quid pro quo* harassment is analyzed under the same principles outlined above, strict employer liability is not by any means compelled.

Several courts that have treated *quid pro quo* harassment as giving rise to strict employer liability have indicated that the liability is predicated on the fact that the supervisor's conduct is within the scope of the employment relation or apparent authority of the supervisor. A representative example is as follows:

> In a *quid pro quo* case, the corporate defendant is strictly liable for the supervisor's harassment. . . . This is logical. When a supervisor requires sexual favors as *quid pro quo* for job benefits, the supervisor, by definition, acts as the company.
>
> In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. . . . In that case, the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose. He acts within the scope of his actual or apparent authority to hire, fire, discipline, or promote.

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir.1989). *See also Bouton v. BMW of N. Am.*, 29 F.3d 103, 106-107 (3d Cir.1994) ("Scope-of-employment liability is often invoked in *quid pro quo* cases because the supervisor has used his authority over the employee's job to extort sexual favors. Without the agency relationship, *quid pro quo* harassment would be impossible, so the employer is responsible."); *Karibian*, 14 F.3d at 777 ("Because the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment—either actually or apparently—the law imposes strict liability on the employer"). However, this view is difficult to sustain when the agency principles set out earlier in this opinion are applied in a similar fashion.

The Seventh Circuit has characterized *quid pro quo* harassment as "exactly the situation where a supervisor's only motivation is to have a conjugal relationship with the employee." *King v. Board of Regents of the Univ. Of Wisconsin Sys.*, 898 F.2d 533, 539 (7th Cir.1990); *see also Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604 (7th Cir.1985) (noting that imposing sexual consideration as a term of employment "serves no legitimate purpose of the employer"). In view of these characterizations, and applying the principles of Restatement § 219(1) outlined above, it would appear that *quid pro quo* harassment generally *would not* be found to fall within the scope of the supervisor's employment because it is not actuated by a purpose to serve the master. *See* RESTATEMENT § 228(2); *but see Horn*, 755 F.2d at 604 (applying respondeat superior liability notwithstanding the fact that the conduct

served no legitimate purpose of the employer).[16] Similarly, for the reasons discussed above, in a factual situation such as that presented by the instant case in which the harassed employee is well aware of the employer's policy prohibiting sexual harassment, that employee possesses facts that would give her reason to know that the supervisor's *quid pro quo* harassment is not within the scope of his authorized conduct and therefore the employee could not hold the employer liable under the principles of apparent authority embodied in Restatement § 219(2)(d). Thus, the negligence standard of § 219(2)(b) remains the only viable avenue under traditional agency principles for imposing liability on the employer under these facts even in the context of *quid pro quo* harassment.[17]

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[16] *Horn* predates *Meritor* and it is unclear whether the strict liability approach articulated in *Horn* survives *Meritor*. Perhaps because it predates *Meritor*, the *Horn* court did not discuss the supervisor's imposition of sexual consideration as a term of employment as *quid pro quo* harassment; rather it analyzed the case as one involving a disparate employment decision taken on the basis of sex—in fact, on several occasions the court indicated that different principles might apply in the sexual harassment context. However, subsequent Seventh Circuit cases, *see King v. Board of Regents of the Univ. Of Wisconsin Sys.*, 898 F.2d 533, 539 (7th Cir.1990), have referred to *Horn* as involving *quid pro quo* harassment. Significant to this discussion, we note that the *Horn* court may have recognized the doctrinal limitations of agency principles for supporting strict liability when it remarked, "whatever the result under the common law of agency, Title VII demands that employers be strictly liable for the discriminatory employment decisions of their supervisory personnel who are delegated the power to make such employment decisions." 755 F.2d at 605. We believe that *Meritor* leaves little room to apply anything but agency principles when evaluating employer liability in the sexual harassment context.

[17] Arguably, as noted in *Jansen*, 895 F.Supp. at 1064, there may be instances where it might be fair to impute knowledge of the harassment to the employer because the harassment is effectuated by one who is in "the upper echelons of management." In the instant case, Despite his title and

The foregoing remarks demonstrate that there appears to be doctrinal inconsistency in imposing strict liability on an employer in the context of *quid pro quo* harassment but not in hostile work environment harassment and, hence, that the propriety of the strict liability standard is open to some question. Perhaps that is why the Seventh Circuit flagged the issue in *Baskerville*. Of course, Ellerth does not purport to base her claim on a *quid pro quo* theory; thus, we will postpone deciding the question of whether the strict liability standard is sustainable until it is more squarely presented to the Court. Our segue into this question was occasioned, of course, because the narrower question actually before us—*viz*., whether to apply the *quid pro quo* standard in a hostile work environment context wherein the hostile environment was created, in part, by *quid pro quo* insinuations—is immaterial unless the *quid pro quo* standard is, in fact, different from the hostile work environment standard. However, under the facts of this case, we conclude that although the *quid pro quo* element of Ellerth's hostile environment is not insubstantial, the gravamen of her complaint is, by far, predicated on Slowik's persistent unwelcome comments of a sexual nature, his repeated comments about her body (including her breasts, legs and "ass"), his lecherous leering, and offensive touching. Accordingly, we believe that the negligence standard generally applicable to hostile environment harassment is more applicable to this case. To apply a *quid pro quo* standard under these facts would amount to the tail wagging the dog. Moreover, to apply a *quid pro quo* strict liability

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position as vice president of sales and marketing of the House Mattress Ticking division, the uncontroverted evidence indicates that Slowik cannot be considered to be at the upper echelons of Burlington's management. The affidavit submitted by Porio, indicates that . . . Accordingly, we are unwilling to conclude that Burlington had knowledge.

standard here merely because there is some element of *quid pro quo* harassment contributing to Ellerth's hostile environment strikes the court as manifestly unjust under the facts presented. It is undisputed that Burlington had a sexual harassment policy and a mechanism for addressing harassment in place. Ellerth was fully aware of the policy and consciously chose to disregard it. Under these facts, there is simply no just reason to impose strict liability on Burlington for the hostile environment created by Slowik.

For all of the foregoing reasons, under the facts presented by this case, we conclude that Burlington cannot be held liable for Slowik's conduct and is therefore entitled to judgment as a matter of law on Ellerth's Title VII claim.

Before moving on to consider Ellerth's second claim, the Court is impelled to make the following remarks concerning the unfortunate facts and outcome of this case. Needless to say, the facts of this case are unfortunate because no person should have to endure the objectification and humiliation that Ellerth was allegedly forced to endure at the hands of Slowik. They are also unfortunate, as with so many of these cases, because they strikingly illustrate that in spite of whatever social enlightenment our nation might have achieved in the wake of the civil rights movement, the various antidiscrimination laws enacted by Congress, and such consciousness raising events in our nation's history as the Anita Hill/Clarence Thomas hearings, the nation's workplaces are still filled with those who are all to eager to exploit their positions of authority and act motivated by discriminatory animus. And, they are also unfortunate because they so plainly demonstrate, by virtue of Ellerth's reluctance to come forward, the effects that systematic oppression has on its victims. The outcome is unfortunate in the sense that Slowik, if Ellerth's allegations are true, is able to walk away from this episode unscathed and Ellerth unable

to recover. We, like so many others, envisioned this outcome in *Jendusa v. Cancer Treatment Centers of Am., Inc.*, 868 F.Supp. 1006, 1013 n. 9 (1994), and now see the effect of the judicial determination that Title VII does not permit recovery against supervisors in their individual capacities. *See U.S. E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir.1995). This Court cannot believe that this outcome was the one envisioned by Congress when enacting Title VII. *See Lynam v. Foot First Podiatry Centers, P.C.*, 886 F.Supp. 1443, 1446 (N.D.Ill.1995).

Constructive Discharge

Ellerth also contends that she was constructively discharged by Burlington as a result of Slowik's conduct. "An employer constructively discharges an employee only if it makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Weihaupt v. American Med. Ass'n*, 874 F.2d 419, 426 (7th Cir.1989). As discussed at length above, Slowik's conduct cannot be imputed to Burlington and Burlington was not negligent in failing to respond to the harassment suffered by Ellerth. Ellerth never reported the harassment. Moreover, nothing in the record suggests that Burlington otherwise treated the plaintiff poorly, let alone intolerably. Burlington provided a grievance procedure for sexual harassment and Ellerth was apprised of Burlington's prohibition against sexual harassment. Ellerth adduced no evidence suggesting that had she properly complained about her harassment her complaints would have gone unheeded or would have been otherwise futile. Ellerth consciously chose not to use Burlington's grievance procedure; therefore, it can not be said that Burlington made Ellerth's working conditions intolerable forcing her into an involuntary resignation. Plainly, when an employer provides an avenue for relief from sexual harassment and an employee chooses to forego that

avenue, she cannot be heard to complain that she was constructively discharged by virtue of the harassment. Accordingly, Burlington is entitled to judgment as a matter of law as to Ellerth's constructive discharge claim.

CONCLUSION

Defendant Burlington Industries, Inc.'s motion for summary judgment in its favor is granted in its entirety. Judgment is hereby entered in favor of Burlington and against plaintiff Kimberly Ellerth. This action is dismissed with prejudice, both sides to bear their own costs.